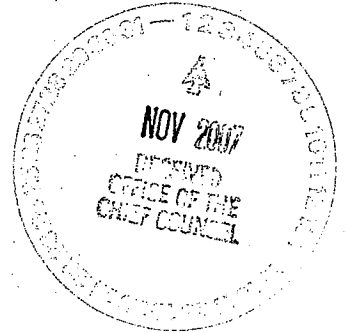


Katharine E. Wagner
kwagner@downeybrand.com



November 2, 2007

VIA COURIER

Office of Chief Counsel
State Water Resources Control Board
The Joe Serna Jr./Cal EPA Building
1001 I Street, 22nd Floor
Sacramento, California 95814

Attn: Jeannette L. Bashaw, Legal Secretary

Re: **Petition for Review; Preliminary Points and Authorities in Support of Petition (Water Code Section 13320) regarding matter of San Francisco Regional Water Quality Control Board's Adopting an Order Requiring Mayhew Center to conduct Action at 3301-3341 Vincent Road, Pleasant Hill, CA (Regional Board File No. 07S0183)**

Dear Ms. Bashaw:

Enclosed please find the Petition for Review of Mayhew Center, LLC in the above matter. Thank you for your attention to this matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

DOWNEY BRAND LLP

A handwritten signature in black ink, appearing to read "Katharine E. Wagner", written over a horizontal line.

Katharine E. Wagner

888272.1

cc: Bruce Wolfe, Executive Officer, SFRWQCB

A circular stamp from the Office of the Chief Counsel. The outer ring contains the text "OFFICE OF THE CHIEF COUNSEL" at the top and "U.S. DEPARTMENT OF JUSTICE" at the bottom. In the center, there is a five-pointed star above the date "NOV 2007". Below the date, the words "RECEIVED" and "OFFICE OF THE CHIEF COUNSEL" are printed in a bold, sans-serif font.

BEFORE THE

In the Matter of Mayhew Center, LLC's,
Petition for Review of Action by the San
Francisco Bay Regional Water Quality
Control Board Adopting An Order
Directing Mayhew Center, LLC, to
Conduct Action on Its Property at 3301-
3341 Vincent Road, Pleasant Hill, CA
(File No. 07S0183),

Mayhew Center, LLC ("Mayhew") hereby timely files this Petition for Review with Preliminary Points and Authorities in support of the Petition, appealing an order demanding immediate costly and unwarranted remedial investigation for tetrachloroethene (PCE) on its property. This is in spite of Mayhew's cooperation with the Regional Board and the impossibility and illogic of the required measures, which ignore the upgradient potential source. A copy of this Order, dated October 3, 2007 and entitled "Approval of *Supplement to Scope of Work to Address Data Gaps, 3301-3341 Vincent Road Property in Pleasant Hill, Contra Costa County*," is attached as Exhibit A ("October Order").

Mayhew owns a 3-acre commercial site that shares a boundary with Walnut Creek Manor, a large campus of senior housing and other uses. Activities at Walnut Creek Manor are supported by extensive maintenance and waste storage facilities where contamination has been found. The soil and groundwater near the property boundary contains elevated concentrations of PCE.

1 commonly used to strip paint or degrease metal. In December 2006, the California Regional
2 Water Quality Control Board, San Francisco Bay Region ("Regional Board") separately ordered
3 each of Mayhew and Walnut Creek Manor to conduct simultaneous investigations of the PCE
4 plume. A copy of the Order issued to Mayhew, entitled "*Property at 3301-3341 Vincent Road,*
5 *Pleasant Hill, Contra Costa County – Order Requiring Report on Soil and Groundwater*
6 *Characterization Pursuant to Water Code Section 13267*," is attached as Exhibit B ("December
7 Order"). Mayhew appealed the December Order, but the State Board dismissed the appeal. The
8 parties are now litigating the matters in Contra Costa County Superior Court. A copy of
9 Mayhew's Petition for Writ of Mandate and its Petition for Review of the December Order are
10 attached as Exhibits C and D, respectively.

11 Despite the pending appeal and Mayhew's good faith cooperation since issuance of the
12 December Order, additional requirements have been imposed upon Mayhew in yet another
13 Section 13267 order, forcing this further appeal. Mayhew should not have been forced to appeal
14 again, and is further damaged by the continuing failure of the Regional Board to afford Mayhew
15 due process of law. The events since the December Order illustrate the inevitable results of the
16 Regional Board's stubborn disregard of the facts and policy and imposition of requirements on a
17 downgradient party because it is "its turn." They show that the Regional Board inexplicably
18 continues to close its eyes to the unbearable burden that the Regional Board and larger neighbor
19 are inflicting on a small property owner. These actions make confirmation of the PCE source
20 impossible, and therefore block any opportunity for Mayhew to defend itself against an endless
21 stream of demands and potential claims of outside parties, or to protect its property value. This
22 appeal affords an opportunity for the State Water Resources Control Board finally to intervene
23 and correct the wasteful and unlawful actions of the Regional Board, thereby also improving the
24 prospects that real progress can be made at the affected properties.

25 1. Petitioner's mailing address is as follows:

26 Mayhew Center, LLC
27 Attn: Dean R. Dunivan
3317 Pleasant Hill Rd.
28 Pleasant Hill, CA 94523
ddunivan@yahoo.com

1 All materials and documents generated in connection with this Petition for Review should
2 be provided to the counsel of record for Mayhew at the following address:

3 Katharine E. Wagner
4 Gregory Broderick
Downey Brand LLP
5 555 Capitol Mall, 10th Floor
Sacramento, California 95814
6 Telephone: (916) 444-1000
kwagner@downeybrand.com
7 gbroderick@downeybrand.com

8 2. Mayhew seeks review of a new Order issued by the Executive Officer of the
9 Regional Board pursuant to Section 13267 of the California Water Code.¹ The October Order
10 requires Mayhew to conduct additional sampling to characterize the vadose zone and
11 groundwater in certain locations on the Mayhew property. In addition, the October Order
12 requires Mayhew to submit, within 12 weeks, a report containing results of the investigation
13 according to the workplan. On its face the October Order mandates investigation to begin
14 immediately, the totality of which is an extraordinary cost and effort. The burden of identifying
15 the vertical and lateral extent of the contamination should not be imposed before the Regional
16 Board's identification of the source of the contamination. To continue to pursue Mayhew's
17 compliance with orders outlining increasingly extensive investigation *on only the downgradient*
18 *side of a boundary line* demonstrates serious flaws in the Regional Board's implementation of
19 Section 13267.

20 3. The October Order was issued on October 3, 2007. This Petition is filed pursuant
21 to Section 13320 of the Water Code, which authorizes any aggrieved person to petition the State
22 Board to review any action (or failure to act) by a Regional Board. See Water Code, § 13223
23 (actions of the Regional Board shall include actions by its Executive Officer pursuant to powers
24 and duties delegated to him by the Regional Board).

25 4. Mayhew challenges the October Order on the following grounds: The Order
26 violates California law substantively and procedurally. Mayhew has suffered and continues to
27 suffer irreparable and other harm based on violation of its constitutional rights to due process in

28 ¹ October Order, attached as Exhibit A.

1 the Regional Board's issuance of the October Order, and the Regional Board's failure to comply
2 with procedures required by the Water Code and State Water Resources Control Board
3 Resolution WQO 92-49 ("Resolution 92-49").

4 The Regional Board's Order fails to comply with of Water Code Section 13267 and
5 Resolution 92-49. The October Order makes no mention of the cost and burden of producing the
6 requested reports. The burdens associated with conducting the required study far outweigh its
7 alleged benefits.

8 The Regional Board's inexplicable actions in this case violate both Resolution 92-49 and
9 Water Code Section 13267's command to facilitate cost-effective, phased investigations. The
10 Regional Board determined that Mayhew is a discharger or suspected discharger by relying on the
11 barest possibility of a discharge and ignoring or unfairly discounting the overwhelming evidence
12 indicating that Mayhew is not the source. This decision is arbitrary and capricious, violates
13 Section 13267, and conflicts with this Board's formally adopted policies.

14 The additional information Required by the October Order improperly specifies the
15 manner by which Mayhew must comply with the October Order, the December Order and Water
16 Code Section 13267.

17 Mayhew has completed its workplan to the satisfaction of the Regional Board. Any
18 further action by the Regional Board to force reporting on the investigation is premature, and is
19 based solely on assumptions and speculation, not supported by findings based on evidence in the
20 record. The evidence does not provide a legally sufficient basis for the requested reports.

21 5. Mayhew is aggrieved because the Regional Board is asking it to collect extensive
22 information that is not appropriate based on the lack of knowledge about the source of the
23 contamination, and the high probability it is on the upgradient property with existing PCE
24 findings. Mayhew is a small business, occupying property nearly one-tenth the size of the Walnut
25 Creek Manor's property. As a good actor, and because the appeal of the December Order
26 continues, Mayhew has been complying with the December Order, expending large amounts of
27 its limited funds on technical reports by a well recognized consulting firm experienced in the
28 field, LFR. Walnut Creek Manor has stridently refused to comply with its December 2006 Order

1 (“Walnut Creek Order”), and has simply repeated the same misleading factual assertions, long
2 since countered by the evidence. That Walnut Creek Manor apparently feels impunity from
3 enforcement is not surprising, based on the Regional Board's failure to contradict these assertions
4 and failure to issue any serious response. Yet the Regional Board continues to push Mayhew to
5 initiate the majority of the investigation. Mayhew strongly disagrees with the Regional Board's
6 characterization of Mayhew as a discharger and with the simultaneous nature of investigating
7 both upgradient and downgradient properties at once. The notion that it is necessary or even
8 appropriate to seek information about the vertical or lateral extent of the contamination *prior* to
9 identifying a source further demonstrates the serious flaws in the Regional Board's approach.
10 Mayhew respectfully submits that the State Board may not allow the Regional Board's irrational,
11 unlawful, and arbitrary action to push an innocent business into financial peril.

12 6. Mayhew requests that the State Board grant the relief requested in this petition, as
13 set forth in the Request for Relief.

14 7. Mayhew's statement of points and authorities in support of the issues raised by
15 this Petition commences below.

16 8. A copy of this Petition is being sent by first-class mail to the Regional Board, on
17 November 2, 2007, to the attention of Mr. Bruce H. Wolfe, Executive Officer.

18 9. The October Order was issued to Mayhew without any formal procedure or notice
19 and opportunity to comment on the record. See 23 Cal. Code Regs., §§ 2050(a)(9). Nevertheless,
20 Mayhew has been in continuing negotiations with the Regional Board and has raised its
21 substantive concerns and objections during these discussions and correspondence.² Many of the
22 fundamental concerns and objections mirror those set out in the Petition for Review before the
23 State Board of the December Order, a copy of which is attached as Exhibit B. In addition, the
24 LFR reports submitted in response to the December Order describe relevant technical facts and
25 judgments underlying many of these concerns and objections.

26 10. Mayhew requests a hearing to address the contentions in the Statement of Points
27

28 ² See Letter from LFR to Elizabeth Allen, Regional Board (August 31, 2007), attached as Exhibit E.

1 and Authorities in accordance with Title 23, California Code of Regulations, Section 2052(c), and
2 reserves the right to request an opportunity to present additional evidence. See 23 Cal. Code
3 Regs., § 2050.6.

4 STATEMENT OF POINTS AND AUTHORITIES

5 I. INTRODUCTION.

6 A. The Downgradient Property.

7 The fundamental question being posed in this case is whether the Regional Board has
8 authority under Section 13267 of the Water Code to require a downgradient property owner to
9 characterize the three-dimensional extent and concentrations of soil and groundwater impacts,
10 without acknowledging or pursuing the source of those impacts. The Regional Board has devised
11 an approach holding that separate but simultaneous investigations are needed on both upgradient
12 and downgradient properties to define the water quality threat posed by PCE, despite the State
13 Board's Resolution No. 92-49 mandating "a reasonable effort to identify the dischargers
14 associated with the discharge."³ While Mayhew acknowledges that the same Resolution requires
15 that the Regional Board identify *one or more persons associated with a discharge* to undertake an
16 investigation, this is not a license to require *multiple properties* to investigate the same source
17 equally and without regard to their physical position or probability as a source, simply to bring
18 more parties to the table. The selective and over-zealous involvement in and pursuit of
19 Mayhew's investigation raise substantial factual and legal issues that call for review by the State
20 Board.

21 The Regional Board has no authority to impose extensive soil and groundwater
22 investigation requirements on the basis of an unsupported and highly speculative conclusion that
23 the Mayhew property is a source of the PCE. There is no indication that PCE was ever used at
24 the Mayhew property, and specific information from the physical setting and competent and
25 thorough technical reports on site history provides evidence that PCE was not used and that no
26

27 _____
28 ³ State Water Resources Control Board Resolution 92-49, *available at*
<http://www.swrcb.ca.gov/resdec/resltn/other/rs92-49.html> (last visited November 2, 2007), at I.B.

1 activities took place in the impacted portion of the Mayhew property.⁴ The Regional Board has
2 never indicated it has contrary evidence or disagreed with the submissions of information on
3 these subjects by Mayhew Center and prior occupants of Mayhew Center.

4 Data collected on the Mayhew property showed elevated concentrations of PCE near the
5 border of the upgradient Walnut Creek Manor site, where testing was done expressly to look for
6 impacts of Walnut Creek Manor activities. The Regional Board found that PCE likely was used at
7 the Walnut Creek Manor property in "fuel and chemical storage, equipment maintenance," and
8 other activities.⁵ The site of these historic activities is located near Walnut Creek Manor's border
9 with Mayhew and could be contributing to pollution at Mayhew's downgradient site.⁶ (See, for
10 example, the photographs included in Attachment A, and Figures 2 and 3 to the Conceptual Site
11 Model and Data Gap Evaluation). Note there are no structures, sewer lines or piping on the
12 Mayhew Center side of the boundary near the fenceline, just a parking lot.⁷) Even if the Regional
13 Board's speculations were supportable, proper research of the contaminated groundwater and soil
14 would, at a minimum entail investigation of both sides of the boundary line to find the discharger,
15 not saddling only one potentially innocent party with determining the three-dimensional extent of
16 the plume in the downgradient area.

17 In light of the disputed source of the contamination, the Regional Board's October Order
18 imposing a firm deadline on further testing by Mayhew is unnecessary, impractical, and
19 inconsistent with law. As a good actor, and because of the ongoing appeal of the December

20 ⁴ See *Conceptual Site Model and Data Gap Evaluation, 3301-3341 Vincent Road Property*, LFR, May 16, 2007
21 (Section 3.4), attached as Attachment 1 to *Scope of Work to Address Data Gaps*, LFR, May 30, 2007 ("Conceptual
22 Site Model and Data Gap Evaluation"), attached hereto as Exhibit F; February 2, 2006 Technical Report by the
23 Former Officers of Etch-Tek, Inc. and April 14, 2006 letter and Declaration of Mr. Ken Beard (Exhibit C to
24 Mayhew's January 2007 Petition for Review attached as Exhibit D hereto). The site history in the Conceptual Site
25 Model and Data Gap Evaluation (p. 6) explains as follows, "According to chemical use information assembled by
26 former officers of ETI (Beard, 2006), chemicals used at the former ETI facility were limited to acids (hydrochloric,
sulfuric), flux solution, metallic solutions, caustic soda, and isopropyl alcohol (IPA). This historical chemical use
data indicates that organic solvents used at the ETI facility was limited to IPA, and did not include chlorinated
solvents. This reported chemical use history is consistent with EPA literature and indicates that PCE was not used at
the ETI facility." No disagreement with this information or EPA references provided by LFR have been expressed
by the Regional Board.

27 ⁵ See Regional Board Order to Walnut Creek Manor (December 14, 2006) attached hereto as Exhibit G, at 3.

28 ⁶ See *id.*

⁷ See, e.g., *Conceptual Site Model and Data Gap Evaluation*, Section 3.0 (utility survey)).

1 Order, Mayhew has complied with the December Order and has prepared extensive technical
2 reports, going beyond what should have been required and extending as far as possible without
3 the participation of the upgradient property.⁸ Mayhew has repeatedly asked for access to the
4 Walnut Creek Manor Property and received rejections or no reply.⁹

5 The Regional Board has not taken enforcement action against Walnut Creek Manor
6 despite issuing a (mildly worded) Notice of Violation in March 2007.¹⁰ In fact, full compliance
7 with the October Order would be impossible for Mayhew to achieve in the absence of the
8 cooperation of the upgradient owner. But most importantly, there is no legal basis to require
9 completion of the work by Mayhew. This Petition arises out of the Regional Board's misguided
10 attempt to push forward an investigative design that is deficient in both its practical and legal
11 bases.

12 B. December 14, 2006 and October 3, 2007 Orders.

13 On December 14, 2006, following an appeal to the State Board to require investigation at
14 Walnut Creek Manor, the Regional Board issued Section 13267 orders to both Walnut Creek
15 Manor and Mayhew. The December Order required Mayhew to submit a soil and groundwater
16 testing plan by January 26, 2007.¹¹ The December Order failed entirely to address Mayhew's
17 contention that any testing that occurs on Mayhew's property is unlikely to be of much value until
18 testing at the Walnut Creek Manor site is completed. It also failed to live up to statements and
19 commitments of the Regional Board that it would ensure that the upgradient work be completed,
20 and that this would be done before Mayhew Center would be required to carry out any work.¹²

21 ⁸ See *Scope of Work to Address Data Gaps* (May 30, 2007), attached hereto as Exhibit F, at Attachment 1.

22 ⁹ See Letter from J. Scott Seyfried, LFR, to Milt Eberle and Marilyn Boswell, Walnut Creek Manor (October 12,
23 2007), attached hereto as Exhibit H (attachments omitted); Email from Brian Kelly, Duane Morris LLP, to Gregory
24 Broderick, Downey Brand (August 2, 2007), attached hereto as Exhibit I; Letter from Brian Kelly, Duane Morris
LLP to Bruce H. Wolfe and Mary Rose Cassa, Regional Board (May 5, 2006), attached hereto as Exhibit J.

25 ¹⁰ See March 21, 2007, Notice of Violation of the December 14, 2006 Order ("Notice of Violation") attached hereto
as Exhibit K.

26 ¹¹ See December Order, Exhibit B.

27 ¹² Letter from Bruce Wolfe to Mayhew Center (February 11, 2005), Exhibit L to the January Mayhew Petition for
28 Review attached as Exhibit D to this Petition; letter from Bruce Wolfe to Michael Bonnifield, counsel to Mayhew
Center (November 14, 2005); see also Case Transfer (September 2005), Hookston Station, Exhibit N to the January
Mayhew Petition for Review.

1 Mayhew appealed the December Order to the State Board on January 16, 2007 and
2 currently has pending before the Superior Court of California a petition for writ of mandate to set
3 aside this order. In the interim, the Regional Board ordered Mayhew to submit by January 4, 2008
4 a report containing the results of the investigation pursuant to the work plan ordered on December
5 14, 2006. This October Order demonstrates further that the Regional Board is unreasonably
6 selecting Mayhew, the downgradient property owner, to bear the brunt of the investigative
7 responsibilities.

8 II. THE ORDER VIOLATES CALIFORNIA LAW SUBSTANTIVELY AND
9 PROCEDURALLY.

10 A. The Additional Information Required by the October Order Improperly Specifies
11 the Manner by which Mayhew Must Comply.

12 State law mandates that “no waste discharge requirement or other order of a Regional
13 Board . . . shall specify *the design, location, type of construction, or particular manner* in which
14 compliance may be had.”¹³ Thus, the Regional Board may limit or prohibit discharge and
15 establish a timeframe for achievement of prescribed limitations, but the Regional Board may not
16 mandate how to achieve those limitations.¹⁴

17 There are two ways in this case in which the Regional Board violates this provision,
18 Water Code Section 13360. First, the Regional Board ordered that Mayhew undertake sampling
19 take place “in the immediate vicinity of Building 2” and in the sewer lateral from that building.¹⁵
20 LFR's technical reports stated that this area was not a data gap due to information in the Hookston
21 Station remedial project as well as site information, and the Regional Board never made a
22
23

24 ¹³ Cal. Water Code §13360(a)(emphasis added).

25 ¹⁴ Id.; Tahoe-Sierra Preservation Council v. SWRCB, 210 Cal.App.3d 1421, 1438 (1989) (“the Water Board may
26 identify the disease and command that it be cured but not dictate the cure . . .”) (emphasis added); see also City of
27 Los Angeles v. SWRCB Case No. BS 060 957 [related case City of Burbank v. SWRCB Case No. BS 060 960],
Statement of Decision (April 4, 2001) (finding that the requirement for a particular treatment or its equivalent
violated Water Code Section 13360; this portion of these two decisions were not appealed by the State Water
Resources Control Board, and remain controlling law).

28 ¹⁵ October Order attached as Exhibit A, at 1.

1 supported technical conclusion to the contrary.¹⁶ The specified location is clearly well
2 downgradient of the previously detected PCE. Besides being scientifically unjustified, this is an
3 obvious contravention of the prohibition against dictating the location of compliance. If Mayhew
4 samples somewhere else besides that prescribed location, Mayhew will be out of compliance *at*
5 *that location*. Therefore, the October Order's additional requirement to take specific samples
6 violates Section 13360.

7 Second, the Regional Board's October Order violates Water Code Section 13360 because
8 it appears to be dictating the manner in which Walnut Creek Manor and Mayhew investigate the
9 source of the discharge. By mandating that Mayhew *simultaneously* investigate the contamination
10 with Walnut Creek Manor, then ordering that testing proceed in the absence of upgradient work,
11 the Regional Board is specifying the design of Mayhew's investigation. Without sequential
12 phases which build on the information gained at each step, the investigative design the Board
13 mandates is bound to fail.¹⁷ This deprives Mayhew and Walnut Creek Manor of the ability to use
14 their ingenuity to determine the method by which to comply with Water Code.¹⁸ The October
15 Order is clearly contrary to the prohibitory mandate in Water Code Section 13360.

16 For these reasons, the State Board should find that the Regional Board's October Order
17 violated Water Code Section 13360, and vacate the Order.

18 B. Mayhew is the Victim of a Serious Abuse of Process

19 The California Constitution recognizes a due process liberty interest in freedom from
20 arbitrary adjudicative procedures.¹⁹ This includes the right to respond orally before a responsible

21 ¹⁶ Letter from LFR, *supra* n.2, attached as Exhibit E, at 2 ("As presented in the [Conceptual Site Model] report,
22 groundwater quality data and passive soil gas data collected downgradient from the Mayhew Center Buildings and
23 associated sewer later and sewer main connections do not indicate the presence of a source for PCE. These data are
24 consistent with a lack of historical PCE use at the Site. As such, additional characterization work in the sewer lateral
area of Building II requested by the [Regional Board] is outside of the data gaps included in the [Conceptual Site
Model]."); Site Conceptual Model and Data Gap Evaluation, Section 4.1, p. 9.

25 ¹⁷ Letter from LFR, *supra* n.2, at 5 ("Data collected on either side of the property boundary can be accurately
26 interpreted and assessed only relative to surrounding data in order to establish concentration gradients and to identify
the apparent source. As a result, the sampling proposed on [Walnut Creek Manor] is necessary to meet the objectives
of the December 14 2006 directive.")

27 ¹⁸ See Tahoe-Sierra Preservation Council v. SWRCB, 210 Cal.App.3d at 1438 ("Section 13360 is a shield against
unwarranted interference with the ingenuity of the party").

28 ¹⁹ California Constitution, Art. I § 7. See also United States Constitution, amend. XIV, § 1.

1 official and to introduce factors into the decision-making process that might not otherwise be
2 considered. The Regional Board has deprived Mayhew of its due process rights in both the
3 December and October Orders. Given the significant property and liberty interests at stake, due
4 process requires a hearing before a neutral officer and/or the right to confrontation, cross-
5 examination, and other formal hearing rights. By requiring action on the December Order within
6 30 days, the Regional Board rendered these due process protections meaningless because the
7 December Order took effect before any kind of an opportunity for a hearing or review. The
8 October Order's 12 week deadline for a report of the investigation pursuant to the December
9 Order compounds these injuries by threatening non-compliance penalties where compliance may
10 be impossible (due to a lack of access to the adjacent property). In addition, the October Order
11 heaps additional investigative requirements on Mayhew even prior to resolution of the judicial
12 appeal of the December Order.

13 Throughout its involvement with Mayhew, the Regional Board has acted as though it has
14 a pre-determined agenda to require Mayhew to investigate and/or cleanup the property regardless
15 of the facts or evidence. The Regional Board bears the burden of providing reasonable evidence
16 showing that the target of a Section 13267 Order is a discharger. Board staff may neither
17 selectively review data, nor may they retaliate against parties who challenge Regional Board
18 actions. In this case, Regional Board staff threatened penalty enforcement action and alleged
19 non-compliance with an order that had been rescinded.²⁰ The Regional Board's continued abuses,
20 whether through bumbling or malice, must not be allowed to continue. Mayhew has suffered and
21 is suffering irreparable and other harm based on the December and October Orders. Respectfully,
22 Mayhew will continue to suffer such irreparable and other harm until the State Board sets aside
23 the October Order or the December Order, on its own motion.

24
25
26 ²⁰ An Order of July 29, 2005, which was never supported or justified, was deemed satisfied or withdrawn in a
27 meeting in August. Suddenly, the Order was "revived" in a Notice of Violation of September 27, 2005. Mayhew's
28 efforts to seek review of the Notice of Violation (obviously itself issued after expiration of the appeal period for the
July 29, 2005, order) were deemed untimely by the State Board's Office of Chief Counsel. Mayhew's efforts to
address the merits of the matter with Regional Board management have been continually rebuffed.

1 III. THE BURDENS ASSOCIATED WITH CONDUCTING THE REQUIRED
2 STUDY FAR OUTWEIGH ITS ALLEGED BENEFITS.

3 Under Water Code Section 13267, an order may be issued only if the burdens of the
4 investigation on the order recipient bear a reasonable relationship to the need for the report and
5 the benefits to be gained thereby.²¹ This test is not met in this case. Mayhew maintains that the
6 nominal benefits of fully characterizing the three-dimensional extent of concentrations of PCE, as
7 opposed to making a reasonable effort to determine the source of the contamination, are far less
8 than the tremendous burdens of the study, which appears to preordain even another, more costly
9 round of work after the soil vapor study.

10 A. The Regional Board's Order Fails to Comply with the Provisions of Section 13267
11 and Resolution 92-49.

12 Water Code Section 13267(b)(1) authorizes a Regional Board to investigate the quality of
13 waters in its region by requiring dischargers to conduct investigations, but requires the Regional
14 Board to ensure that the "burden, including costs, of these reports shall bear a reasonable
15 relationship to the need for the reports and the benefits to be obtained from the reports."²²
16 Resolution 92-49 fills out this cost/benefit analysis requirement, explaining that the Regional
17 Board *shall* "[c]onsider whether the burden, including the costs, of reports required of the
18 discharger . . . bears a reasonable relationship to the need for the reports and the benefits to be
19 obtained from the reports."²³ The Regional Board's October Order fails to comply with both the
20 substance and procedure of Section 13267 and Resolution 92-49.

21 First, the October Order does not even mention, much less consider or estimate, the cost
22 of executing the workplan. Second, the Regional Board failed to consider the economic impact
23 upon Mayhew, or to explain its balance of costs and benefits. Because the October Order does
24 not merely carry out directives from the December Order but establishes new requirements, the
25

26

²¹ Water Code, § 13267(b)(1).

27 ²² Id.; accord City of Arcadia v. State Water Resources Control Bd., (2006) 135 Cal.App.4th 1392, 1413.

28 ²³ See State Water Resources Control Board, Resolution 92-49, *supra* n.3, at III.B.

1 Regional Board must consider anew the additional costs to Mayhew of the investigation and
2 report ordered by the approval of the workplan. Section 13267 provides that “the regional board
3 *shall* provide the person with a written explanation with regard to the need for the reports, and
4 *shall* identify the evidence that supports requiring that person to provide the reports.”²⁴ But the
5 Regional Board failed to provide a written explanation of why the investigation and report are
6 cost-effective or what evidence supports its decision.

7 Third—and perhaps not surprisingly given the Regional Board’s failure to engage in a
8 meaningful evaluation of costs and benefits—the investigation proposed by the Regional Board is
9 not cost-effective. Resolution 92-49 indicates that one of the key methods for a cost-effective
10 investigation is the ability to “focus investigative activities on locations and wastes or materials
11 handled at the site.”²⁵ In Mayhew’s case, the only way to focus on the locations where the waste
12 may be is to characterize the upgradient source *first*. As explained more fully in Mayhew’s
13 appeal of the December Order before this State Board, there is nothing but bare speculation that
14 former tenants of the Mayhew property used PCEs at the site in the 1970s. On the other hand,
15 there is evidence indicating that the upgradient Walnut Creek Manor property is a likely source of
16 the PCE contamination.

17 Further, Resolution 92-49 suggests that a “progressive” or phased investigation is not only
18 appropriate, but the default.²⁶ In fact, paragraph II.A.2 of the Resolution indicates that deviation
19 from the progressive approach is only appropriate in case of emergency, imminent threat of
20 pollution, delayed investigations, or very small discharges.²⁷ A reasonable, cost-effective, phased
21 investigation at this point would first look to the probable source of PCE at the Walnut Creek
22 Manor and then work its way downgradient. The pollution levels will likely act like a roadmap,
23 indicating where to look next. Knowing the path and the point at which the PCE transitions from
24 Walnut Creek Manor to the Mayhew site will show consultants where to look for PCE on the

25
26 ²⁴ Cal. Water Code § 13267(b)(1) (emphasis added).

27 ²⁵ Resolution 92-49 at ¶ III.D.1.a.

28 ²⁶ Resolution 92-49 at ¶ II.A.1.

²⁷ See *id.* at ¶¶ II.A.2(a)-(d).

1 Mayhew property.

2 Such a phased approach is more likely to reduce costs for all parties involved, lead to a
3 better understanding of the extent of the PCE contamination, and reduce the overall
4 environmental impact. The State Board's own policies are in accord. Resolution 92-49 declares
5 that "[o]verall costs have increased" when cleanup activities "have had no positive effect," and
6 that such inefficient action has even "exacerbated the pollution."²⁸ Phased investigations
7 "facilitate adequate delineation of the nature and extent of the pollution, and may reduce overall
8 costs and environmental damage."²⁹ This Board has also recognized that "investigations
9 inherently build on information previously gained,"³⁰ the thrust of Mayhew's argument. A
10 logical investigation at the upgradient source is likely to tell regulators where to look for PCE on
11 its property and is likely to lead to a more efficient, faster cleanup.

12 Finally, this Board has recognized that "improperly planned investigations" often result in
13 "greater costs or increased environmental damage."³¹ The Regional Board's haphazard,
14 spasmodic activities in this case have resulted in improper planning, and threaten to impose
15 greater costs on Mayhew and to delay site cleanup, leaving the PCE at elevated levels in both soil
16 and groundwater. The Regional Board has not considered the contamination that has been found
17 within Walnut Creek Manor's property in waste recycling and storage areas. The Regional
18 Board's inexplicable actions in this case violate both Resolution 92-49 and Water Code Section
19 13267's command to facilitate cost-effective, phased investigations, and must be vacated.

20
21
22
23
24
25
26 ²⁸ Id. at ¶ 14.

27 ²⁹ Id. at ¶ 15.

28 ³⁰ Id.

³¹ Id.

1 B. The Regional Board Labeling Mayhew a “Discharger” Lacks Support in the
2 Record.

3
4 Section 13267 does not authorize the Regional Board to order investigations *carte*
5 *blanche*. Rather, that authority is limited to a person “who has discharged, discharges, or is
6 suspected of having discharged or discharging, or who proposes to discharge waste within its
7 region.”³² In making its decisions, the Board must rely on “relevant evidence,”³³ which the
8 statutory scheme defines as anything “on which responsible persons are accustomed to rely in the
9 conduct of serious affairs.”³⁴ Resolution 92-49 confirms this understanding, and includes a non-
10 exhaustive list of ten routine forms of evidence that the Regional Board may use.³⁵ Here, the
11 Regional Board determined that Mayhew is a discharger or suspected discharger by relying on the
12 barest possibility of a discharge and ignoring or unfairly discounting the overwhelming evidence
13 indicating that Mayhew is not the source. This decision is arbitrary and capricious, violates
14 Section 13267, and conflicts with this Board’s formally adopted policies.

15 There is no indication that anyone has ever discharged anything at the Mayhew property.
16 Rather, the vast weight of the evidence suggests that the upgradient Walnut Creek Manor
17 property is the source. First, the Regional Board has determined that Walnut Creek Manor is at
18 least a source of PCE,³⁶ ordering it to conduct an investigation on its property.³⁷ The Order
19 issued to Walnut Creek Manor indicates that pollution near its boundary with Mayhew revealed
20 high levels of PCE and that sampling downgradient—just across the border onto Mayhew’s
21 property—suggested that Walnut Creek Manor was the source.³⁸ The Order to Walnut Creek
22 Manor also explains that the PCE pollution is clustered near Walnut Creek Manor’s former

23 ³² Cal. Water Code § 13267(b)(1).

24 ³³ Id.

25 ³⁴ Id. at § 13267(e).

26 ³⁵ See Resolution 92-49 at ¶ I.A.

27 ³⁶ See Walnut Creek Manor Order, *supra* n.5, attached hereto as Exhibit G, at 3 (“Your property is a suspected
28 source of PCE . . .”).

³⁷ See id.

³⁸ See id. at 2-3.

1 maintenance facility and notes the discovery of a previously concealed 5,000 gallon UST that was
2 in operation from 1963 to 1998 near the PCE "hot spot."³⁹ This information, along with the
3 direction of groundwater flow beneath the properties, strongly suggests that the upgradient
4 Walnut Creek Manor campus is the source. In light of these facts, Mayhew Center should be
5 treated as a landowner above contaminated groundwater migrating from offsite consistent with
6 Regional Board policies, and provided assurance that it will not be required to take action in
7 consistent with those policies, not ordered to take action.⁴⁰

8 In contrast with the comparatively strong evidence of PCE use at the Walnut Creek Manor
9 campus is the paucity of evidence that PCE was ever used at Mayhew's site. The burden of proof
10 is on the Regional Board to support its suspicion that PCE was discharged at the Mayhew site.

11 IV. EVEN IF THERE IS A POTENTIAL THAT THE SOURCE OF THE
12 POLLUTION IS NOT AT WALNUT CREEK, THE REGIONAL BOARD'S
13 OCTOBER ORDER IS PREMATURE AND IS NOT SUPPORTED BY
14 FINDINGS BASED ON EVIDENCE IN THE RECORD.

15 Contrary to the suspicions and speculation of Regional Board staff, currently available
16 data do not suggest that Mayhew is the source of the PCE contamination. At a minimum, any
17 further studies required by the December Order and resulting Mayhew workplan should be
18 deferred until after Walnut Creek Manor has completed and begun implementing its workplan. If
19 based on data from Walnut Creek Manor investigations the source is determined to *not* be on
20 Mayhew property, as Mayhew believes will be the case, any further costs to Mayhew will be
21 unnecessary. As discussed in Section II above, Mayhew is strongly of the view that there is no
22 defensible technical basis for requiring Mayhew to investigate the three-dimensional extent and
23 concentrations of PCE before the Regional Board makes a reasonable effort to identify the
24 dischargers. This invalidates the October Order's request for a report from a legal standpoint

25
26 ³⁹ See *id.* at 3.

27 ⁴⁰ See, e.g. Letter from Bruce Wolfe to George Walker, Golden Gate Tours, regarding 3880 Vincent Road (December
28 19, 2006) (summarizing policy that no action would be required due to indications that source is "likely" upgradient and associated with other areas at the Hookston Station sources). No testing has been required of 3880 Vincent Road owners.

1 under the standard set forth in Water Code Section 13267.

2 Mayhew has completed its workplan to the satisfaction of the Regional Board. Any
3 further action by the Regional Board to force reporting on the investigation is premature, and is
4 based solely on assumptions and speculation, not supported by findings based on evidence in the
5 record. The evidence does not provide a legally sufficient basis for the requested reports.

6 **REQUEST FOR RELIEF**

7 For the reasons set forth above, Mayhew respectfully requests that the State Board grant
8 Mayhew the following relief:

- 9 A. That the October Order, as written, be rescinded by the State Board.
- 10 B. That the State Board direct the Regional Board either to: (i) make a reasonable
11 effort to identify the discharger of the discharge, or (ii) require investigation of Walnut Creek
12 Manor prior to the initiation of investigation at Mayhew.
- 13 C. That the State Board direct the Regional Board to refrain from issuance of any
14 additional requirements under Section 13267 with respect to the Mayhew characterization of the
15 three-dimensional extent and concentrations of PCE and its environmental degradation products
16 until the resolution of the appeal of the December Order.
- 17 D. Such other relief as the State Board may deem just and proper.
- 18
- 19

20 Respectfully Submitted,

21

22 DATED: November 2, 2007

DOWNEY BRAND LLP

23
24 By: 

25 KATHARINE E. WAGNER
26 Attorney for Petitioner
27 MAYHEW CENTER, LLC
28

887365.7

EXHIBIT A



California Regional Water Quality Control Board

San Francisco Bay Region



Linda S. Adams
Secretary for
Environmental
Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
Phone (510) 622-2300 • FAX (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger
Governor

Date: October 3, 2007
File No: 07S0183 (EA)

Mayhew Center, LLC
Attn: Dean Dunivan
rddunivan@yahoo.com
3317 Vincent Road
Pleasant Hill, CA 94523

SUBJECT: Approval of *Supplement to Scope of Work to Address Data Gaps, 3301 – 3341
Vincent Road Property in Pleasant Hill, Contra Costa County*

Dear Mr. Dunivan:

We have reviewed the supplement to the scope of work submitted for the Mayhew Center property (LFR; August 31, 2007). This report was submitted to satisfy the requirement of our August 14, 2007, letter conditionally approving Mayhew Center's Scope of Work (LFR; May 30, 2007) to characterize the three-dimensional extent and concentrations of tetrachloroethene (PCE) and its environmental degradation products in the subsurface. Approval of the May 30 scope of work was contingent on four conditions: 1) expansion of the passive soil vapor survey south of the proposed extent, 2) additional investigation at the western edge of Building 2 to either confirm or disprove the presence of a potential source area in the vicinity of the rear door, 3) sampling in the vicinity of the Building 2 sewer lateral, and 4) a description of the second phase of the planned site investigation along with a detailed schedule. As explained below, the report is hereby approved.

The scope of work proposes a phased approach to the site investigation. The first phase will consist of a passive soil gas investigation; subsequent investigations will involve collection of discrete soil, soil gas, and groundwater samples. We do not concur that the extent of the proposed sampling is sufficient to either confirm or disprove whether solvents were discharged via the roll-up door located in the western wall of Building 2. Consequently, additional sampling will ultimately be required to characterize the vadose zone and, if appropriate, groundwater in the immediate vicinity of Building 2. This data gap may be addressed initially through expansion of the passive soil gas investigation proposed in the first investigative phase, or later via collection of discrete samples during the follow-on sampling.

According to the schedule proposed in the scope of work, recommendations for specific sample locations for the follow-on sampling program will be submitted to the Water Board 12 weeks from approval of the scope of work. We encourage you to conduct the soil vapor sampling work

Preserving, enhancing, and restoring the San Francisco Bay Area's waters for over 50 years



Recycled Paper

promptly to avoid wet-weather conditions. **You are required to submit by January 4, 2008, a report containing the results of the investigation pursuant to this workplan. This report shall also include a work plan that contains the following elements:**

- The proposed locations of follow-on borings for collection of discrete soil/soil gas/groundwater samples.
- Proposed sampling depths along with specific media and analytical method(s) proposed for samples collected from each sampling interval.

This Order requiring submittal of a report is made pursuant to Water Code Section 13267, which allows the Board to require technical or monitoring program reports from any person who has discharged, discharges, proposes to discharge, or is suspected of discharging waste that could affect water quality. The enclosure provides additional information about Section 13267 requirements. Any extension in the above deadline must be confirmed in writing by Board staff.

If you have any questions, please contact Elizabeth Allen of my staff at (510) 622-2332 [e-mail ecallen@waterboards.ca.gov].

Sincerely,



Bruce H. Wolfe
Executive Officer

Digitally signed by Stephen Hill
Date: 2007.10.03 12:08:36 -07'00'

Enclosure: Water Code Section 13267 Fact Sheet
cc w/enclosure: see next page

cc w/enclosure (by e-mail only):

Katharine Wagner
kwagner@downeybrand.com
Downey Brand
555 Capitol Mall, 10th Floor
Sacramento, CA 95814

J. Scott Seyfried
LFR
4190 Douglas Blvd., Suite 200
Granite Bay, CA 95746-5961
scott.seyfried@lfr.com

Walnut Creek Manor, LLC
Attn: Milt Eberle
Wgidinc@aol.com
1686 Union Street Suite #306
San Francisco, California 94123

Paul Andrews
CCCHSD
pandrews@hds.co.contra-costa.ca.us
4333 Pacheco Boulevard
Martinez, CA 94553

Betsy Jennings, SWRCB
BJennings@waterboards.ca.gov

Deborah Schmall
dschmall@fbm.com

Sarah Peterman
speterman@fbm.com

Farella, Braun, & Martel LLP
235 Montgomery St., 17th floor
San Francisco, CA 94104

Union Pacific Railroad Company
Attn: Michael J. Grant
mjgrant@up.com
49 Stevenson Street, Suite 1050
San Francisco CA 94105

Scott D. Warner
Geomatrix
2101 Webster Street, 12th Floor
Oakland, CA 94612
swarner@geomatrix.com

Dan Helix
dc.helix@netvista.net
1102 Northridge Ct.
Concord, CA 94518-1533

Brian Kelly
BAKelly@DuaneMorris.com
DuaneMorris
One Market, Spear Tower, Suite 2000
San Francisco, CA 94105-1104
BAKelly@DuaneMorris.com

Dorothy Dickey, SWRCB
DDickey@waterboards.ca.gov



California Regional Water Quality Control Board

San Francisco Bay Region



Linda S. Adams
Secretary for
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger
Governor

Fact Sheet – Requirements For Submitting Technical Reports Under Section 13267 of the California Water Code

What does it mean when the regional water board requires a technical report?

Section 132671 of the California Water Code provides that "...the regional board may require that any person who has discharged, discharges, or who is suspected of having discharged or discharging, or who proposes to discharge waste...that could affect the quality of waters...shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

This requirement for a technical report seems to mean that I am guilty of something, or at least responsible for cleaning something up. What if that is not so?

The requirement for a technical report is a tool the regional water board uses to investigate water quality issues or problems. The information provided can be used by the regional water board to clarify whether a given party has responsibility.

Are there limits to what the regional water board can ask for?

Yes. The information required must relate to an actual or suspected or proposed discharge of waste (including discharges of waste where the initial discharge occurred many years ago), and the burden of compliance must bear a reasonable relationship to the need for the report and the benefits obtained. The regional water board is required to explain the reasons for its request.

What if I can provide the information, but not by the date specified?

A time extension may be given for good cause. Your request should be promptly submitted in writing, giving reasons.

Are there penalties if I don't comply?

Depending on the situation, the regional water board can impose a fine of up to \$5,000 per day, and a court can impose fines of up to \$25,000 per day as well as criminal penalties. A person who submits false information or fails to comply with a requirement to submit a technical report may be found guilty of a misdemeanor. For some reports, submission of false information may be a felony.

Do I have to use a consultant or attorney to comply?

There is no legal requirement for this, but as a practical matter, in most cases the specialized nature of the information required makes use of a consultant and/or attorney advisable.

What if I disagree with the 13267 requirements and the regional water board staff will not change the requirement and/or date to comply?

You may ask that the regional water board reconsider the requirement, and/or submit a petition to the State Water Resources Control Board. See California Water Code sections 13320 and 13321 for details. A request for reconsideration to the regional water board does not affect the 30-day deadline within which to file a petition to the State Water Resources Control Board

If I have more questions, whom do I ask?

Requirements for technical reports indicate the name, telephone number, and email address of the regional water board staff contact.

Revised August 2005

EXHIBIT B



California Regional Water Quality Control Board

San Francisco Bay Region



Linda S. Adams
Secretary for
Environmental
Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger
Governor

DEC 14 2006

Date:

File No: 07S0183 (MRC)

Mayhew Center, LLC
Attn: Dean Dunivan
rddunivan@yahoo.com
3317 Vincent Road
Pleasant Hill, CA 94523

SUBJECT: Property at 3301-3341 Vincent Road, Pleasant Hill, Contra Costa County - Order Requiring Report on Soil and Groundwater Characterization Pursuant to Water Code Section 13267

Dear Mr. Dunivan:

This Order requires that Mayhew Center, LLC (hereafter "you") submit a report on soil and groundwater characterization for your property, known as Mayhew Center and located at 3301-3341 Vincent Road in Pleasant Hill, California. This Order supersedes and replaces all previous pending directives pursuant to Water Code Section 13267 for the subject property. Data you have submitted in response to previous directives was obtained without a workplan approved by this Board and without oversight of a qualified geologist or engineer. However, that data has been considered in preparing this order and shall be considered as part of the response to this order. As explained below, the required information will help Board staff to evaluate the nature and extent of soil and groundwater contamination beneath your property, which can then be used to design remedial activities if appropriate.

Background

Investigations regarding the contamination of soil and groundwater at the Hookston Station site, located at 228 Hookston Road, have been conducted since 1989. These investigations discovered the presence of chlorinated solvents (which are commonly used as degreasers) in the soil and groundwater at the site. Because of their chemical characteristics, when chlorinated solvents are released into the environment via, e.g., spills on the ground or leaks from underground tanks or piping, they migrate downward, eventually encountering groundwater. The solvents dissolve into groundwater and then are carried along with the flow of the groundwater. Solvents can also be washed across the ground surface before migrating downward. This can sometimes lead to offsite contamination of shallow soil and groundwater.

Most solvents are relatively dense (specific gravity greater than 1.0) and tend to migrate downward through the soil column over time. If a release of solvents occurred several years ago, it is likely that the solvents have migrated downward and may be present at higher concentrations at greater depth. Further, most solvents have a tendency to evaporate readily (vapor pressure substantially less than that of water at 760 mm), and concentrations detected in shallow soil are not expected to be indicative of the absence of a historic release.

Depending on the length of time that has elapsed since a solvent release occurred, it is possible for the released solvent to have migrated through the unsaturated soil column and to have accumulated below the ground water in a zone underlain by fine-grained deposits. Therefore, groundwater sampling is a necessary component of any solvent source area investigation to conclusively determine the absence or presence of a solvent source.

In October-November 2001, a passive soil vapor survey was conducted for the Hookston Station remedial investigation as a screening tool to identify the approximate limits of soil and ground water impacted with Hookston-related chlorinated solvents. During that investigation, elevated concentrations of the chlorinated solvent tetrachloroethene (PCE) and associated breakdown products were found in soil vapor samples collected along Vincent Road, near your property at 3301-3341 Vincent Road. Subsequent investigation and monitoring activities identified concentrations of PCE in groundwater as high as 7,200 micrograms per liter ($\mu\text{g/L}$) in monitoring wells installed in Vincent Road. PCE has not been identified as a solvent that was used at the Hookston Station site. Ground water monitoring data indicate that the chemical impacts from PCE may originate from an off-site (i.e., non-Hookston) source area that appears to be located west (upgradient) of Hookston Station. Based on groundwater monitoring data for the Hookston Station site (e.g., *Third Quarter 2006 Monitoring Report*, ERM, October 31, 2006), it appears that an upgradient source may have merged with the Hookston Station groundwater impacts, and the mixed ground water plume has migrated further downgradient beneath a residential neighborhood.

Shallow groundwater sampling was conducted on your property (Heilshorn Environmental Engineering; May 20, 2005) to evaluate soil and groundwater conditions in the vicinity of historic storage and maintenance activities by your neighbor, Walnut Creek Manor, along the boundary with your property. Groundwater was encountered in a borehole on your property at about 12 feet below ground surface. That sample indicated the presence of PCE in groundwater up to 1,200 micrograms per liter ($\mu\text{g/l}$), which exceeds the drinking water standard of 5 $\mu\text{g/l}$ and exceeds the California Regional Water Quality Control Board, San Francisco Bay Region, Environmental Screening Level (ESL) of 120 $\mu\text{g/l}$ for groundwater that is not a source of drinking water.

Preliminary shallow soil sampling on your property (July 26, 2005) was carried out without a workplan approved by this Board and without oversight of a qualified geologist or engineer. Nevertheless, data from that preliminary shallow soil sampling indicates the presence of PCE in unsaturated soil up to 11 milligrams per kilogram (mg/kg) at a depth of six feet below ground surface on your property. This concentration exceeds the ESL of 0.24 mg/kg for commercial land use and to prevent leaching to groundwater.

Your property is a suspected source of PCE because it has been detected in soil and groundwater beneath your property. A tenant on the property before you owned it manufactured printed wiring boards, a process that normally involves the use of various solvents. Documentation exists that indicates solvents were used in the tenant's manufacturing operations. This former tenant has stated that PCE was not used in the manufacturing operations at the site; however, the statement is based on recollection of operations that took place about 25 years ago. Additionally, documentation exists that indicates the presence of a structure on your property during the time in which the former manufacturing operations were active. The structure appears to be located near the apparent source area for the PCE. The former tenant has also stated that the structure was not involved in the manufacturing operations (again, based on recollections from 25 years ago). You have also indicated that the structure was not involved in the operations by stating that there are no plumbing lines from the building to the location of the former structure. However, piping could have been removed at any time while the former manufacturer was located at the property or after the manufacturer vacated the property in the early 1980s until you acquired the property in the early 1990s. Further, the structure could have been used for activities not directly involved in the manufacturing process.

Results of soil investigations near the boundary between your property and Walnut Creek Manor indicate that the highest concentrations of PCE in soil are found beneath your property. Your property is about three feet higher in elevation than where the historic storage and maintenance activities occurred at Walnut Creek Manor. The elevated soil concentrations in soil beneath your property are at least one foot higher in elevation and at least twice the magnitude as concentrations in soil at Walnut Creek Manor. It is unlikely that elevated soil concentrations beneath your property in the unsaturated zone above the water table are related entirely to volatilization of dissolved solvents in groundwater that you have asserted must be coming from Walnut Creek Manor. It is also unlikely that a two-fold increase in soil concentration between Walnut Creek Manor and your property could be attributed entirely to migration or volatilization within the soil. We therefore infer that contamination may have migrated from a place or places at or near the ground surface that have not been previously sampled. To define the horizontal and vertical distribution of PCE in the subsurface, we require chemical analysis of soil samples from the ground surface through the unsaturated zone, to the first occurrence of groundwater. We also require measurement of depth to groundwater and systematic sampling and analysis of groundwater that occurs in one or more discrete hydrostratigraphic units beneath areas where soil is impacted, as well as laterally to characterize the extent of the groundwater plume.

Contamination Impacts

The contamination on your property threatens to adversely affect the beneficial uses of groundwater, which include municipal and domestic supply, industrial process and service water supply, and agricultural supply. In addition, this contamination threatens to adversely affect Walnut Creek, the surface water body closest to your property. This contamination threatens to cause a condition of pollution in waters of the State, and should be fully delineated and abated in the shortest reasonable period of time. Further, it is possible that PCE on your site is contributing to downgradient contamination beneath a residential neighborhood.

Requirement to Submit a Workplan

This Order is directed to you as the owner of property where contamination at which the Water Board suspects a discharge of waste is occurring or may have occurred that could affect the quality of waters of the state. It is necessary to sample soil and groundwater beneath your property to determine the horizontal and vertical distribution of PCE in the subsurface. This information will assist in identifying a source area near the property boundary and may also be used to determine the responsible party for the release to the environment. The information may also provide a basis for decisions regarding subsequent cleanup and abatement action.

You are required to submit a report containing the following information by January 26, 2007:

A workplan designed to characterize the soil and groundwater on and beneath your property and help develop a better conceptual understanding of the pollution. In general the workplan shall propose to obtain data to define source areas of contamination, the vertical and lateral extent of contamination, the potential pathways of migration, and the potential receptors that might be at risk from the contamination. The data will be used to determine whether, and to what extent, a threat to human health or the environment exists and to develop and evaluate remedial alternatives (including the no-action alternative). The workplan shall include the following elements:

- Analysis and summary of the site background and physical setting
- Presentation of the conceptual site model, including an analysis and summary of the nature and extent of contamination and the additional data needed to complete the site characterization and evaluation of remedial alternative (if needed).
- Sampling program based on known information such as locations of utilities and structures, historic activities, and existing analytical data. The sampling program shall be designed to document concentration gradients in soil and groundwater and identify source areas, and shall include soil borings as close as practicable to the retaining wall at the base of the slope on the west boundary of your property.
- Sampling objectives, with sample location, frequency, and designation. The objective of the soil and groundwater sampling is to gain an understanding of the three-dimensional extent and concentrations of PCE (and its environmental breakdown products) in the subsurface, and an understanding of the geologic and hydrologic factors that control the migration of PCE. The workplan shall depict proposed locations on a scaled map and include provisions for surveying sample locations by a licensed professional land surveyor.
- Sampling equipment and procedures. Appropriate site characterization shall include soil samples from the surface to groundwater and grab-groundwater samples at multiple depths. Soil boring logs shall include location and designation and specific information including depth of borehole, percent recovery, sample depths, depth to groundwater, and geologic observations such as color and texture (Unified Soil Classification System), moisture content, odor, and presence of suspected contaminants. The workplan shall clearly state how soil samples will be selected and what length of soil core will be cut, sealed, and preserved for analysis. It is common practice to select portions of the continuous soil core for analysis that show the greatest field evidence for chemical impact (i.e., have an odor or unusual staining, or have elevated photoionization detector (PID))

readings). It is also common practice to collect groundwater samples from zones with sufficient groundwater flow from each hydrostratigraphic interval. Exact sample depths shall be determined in the field, based on observation.

- Sample handling and analysis
- Quality assurance objectives and procedures
- Project Schedule with corresponding time to complete individual tasks

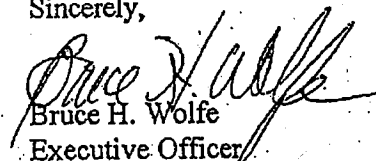
The foregoing workplan is needed to address the ongoing water quality threat posed by PCE in shallow groundwater. The workplan required by this Order will help Board staff define the horizontal and vertical distribution of PCE in the subsurface and evaluate remedial measures, if appropriate. To date, the source area for the release appears to straddle the boundary between your property and Walnut Creek Manor. This information will assist in identifying a source area and may also be used to determine the responsible party for the release to the environment. More detailed information is available in the Regional Water Board's public file on this matter.

Based on Board experience with hundreds of groundwater investigation sites, I expect this workplan to cost less than \$10,000. This cost is reasonable in light of the need to understand the nature and extent of the area contaminated in order to determine what degree of remediation is necessary to protect water quality and public health. The Workplan may propose a phased investigation, such as including a soil-vapor investigation to identify hot-spots for follow-up sampling, and may be prepared by a third party. Because the site characterization process is dynamic and iterative, additional workplans may be needed in the future to incorporate new information and refined objectives for the site. Please consult the Geotracker website (<http://geotracker.waterboards.ca.gov>) for information regarding electronic data submittal. The Global ID Number is SL0601341185. Please submit a paper copy report for staff review and reference file number 07S0183 on all correspondence and reports.

This Order requiring submittal of a report is made pursuant to Water Code Section 13267, which allows the Board to require technical or monitoring program reports from any person who has discharged, discharges, proposes to discharge, or is suspected of discharging waste that could affect water quality. The enclosure provides additional information about Section 13267 requirements. Any extension in the above deadline must be confirmed in writing by Board staff.

If you have any questions, please contact Mary Rose Cassa of my staff at (510) 622-2447 [e-mail mcassa@waterboards.ca.gov].

Sincerely,


Bruce H. Wolfe
Executive Officer

Enclosure: California Water Code Section 13267 Fact Sheet



California Regional Water Quality Control Board

San Francisco Bay Region



Linda S. Adams
Secretary for
Environmental
Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger
Governor

Fact Sheet – Requirements for Submitting Technical Reports Under Section 13267 of the California Water Code

What does it mean when the regional water board requires a technical report? Section 13267¹ of the California Water Code provides that "...the regional board may require that any person who has discharged, discharges, or who is suspected of having discharged or discharging, or who proposes to discharge waste...that could affect the quality of waters...shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

This requirement for a technical report seems to mean that I am guilty of something, or at least responsible for cleaning something up. What if that is not so? The requirement for a technical report is a tool the regional water board uses to investigate water quality issues or problems. The information provided can be used by the regional water board to clarify whether a given party has responsibility.

Are there limits to what the regional water board can ask for?

Yes. The information required must relate to an actual or suspected or proposed discharge of waste (including discharges of waste where the initial discharge occurred many years ago), and the burden of compliance must bear a reasonable relationship to the need for the report and the benefits obtained. The regional water board is required to explain the reasons for its request.

What if I can provide the information, but not by the date specified?

A time extension may be given for good cause. Your request should be promptly submitted in writing, giving reasons.

Are there penalties if I don't comply?

Depending on the situation, the regional water board can impose a fine of up to \$5,000 per day, and a court can impose fines of up to \$25,000 per day as well as criminal penalties. A person who submits false information or fails to comply with a requirement to submit a technical report may be found guilty of a misdemeanor. For some reports, submission of false information may be a felony.

Do I have to use a consultant or attorney to comply?

There is no legal requirement for this, but as a practical matter, in most cases the specialized nature of the information required makes use of a consultant and/or attorney advisable.

What if I disagree with the 13267 requirements and the regional water board staff will not change the requirement and/or date to comply?

You may ask that the regional water board reconsider the requirement, and/or submit a petition to the State Water Resources Control Board. See California Water Code sections 13320 and 13321 for details. A request for reconsideration to the regional water board does not affect the 30-day deadline within which to file a petition to the State Water Resources Control Board.

If I have more questions, whom do I ask? Requirements for technical reports indicate the name, telephone number, and email address of the regional water board staff contact.

¹ All code sections referenced herein can be found by going to www.leginfo.ca.gov.

EXHIBIT C

1 DOWNEY BRAND LLP
2 KATHARINE E. WAGNER (SBN 119429)
3 GREGORY T. BRODERICK (SBN 220871)
4 555 Capitol Mall, Tenth Floor
Sacramento, CA 95814-4686
Telephone: (916) 444-1000
Facsimile: (916) 444-2100

5 Attorneys for Plaintiff and Petitioner
6 MAYHEW CENTER, LLC

FILED

APR - 6 2007

K. TORRE CLERK OF THE COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA
By _____ Deputy Clerk

7 SUPERIOR COURT OF CALIFORNIA

8 COUNTY OF CONTRA COSTA

9
10 MAYHEW CENTER, LLC

11 Plaintiff and Petitioner,

12 v.

13 REGIONAL WATER QUALITY
14 CONTROL BOARD, SAN FRANCISCO
BAY REGION, a California State Agency,

15 Defendant and Respondent

N07-0513

CASE NO. _____

**PETITION FOR WRIT OF MANDAMUS
[Code of Civil Procedure §1094.5; Water
Code §13330]; APPLICATION FOR STAY;
AND COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

16
17
18
19 Plaintiff and Petitioner MAYHEW CENTER, LLC, ("Mayhew") hereby requests
20 declaratory and injunctive relief and petitions this Court for a writ of mandate and other relief,
21 pursuant to Code of Civil Procedure section 1094.5 and California Water Code section 13330,
22 directing Respondents California Regional Water Quality Control Board, San Francisco Bay
23 Region ("Regional Board"), to set aside the Regional Board's December 14, 2006, Order
24 ("Mayhew Order") requiring Mayhew to file and execute a work plan under California Water
25 Code section 13267. Additionally, Mayhew seeks a judicial stay of the contested provisions
26 pending resolution of this action. In support of its petition and complaint, Mayhew alleges the
27 following:
28

1
2
3
4
5
6
7
8
PARTIES

1. Petitioner Mayhew Center, LLC, is a small business consisting of one three-acre parcel leasing office space to other small businesses.

2. Respondent Regional Water Quality Control Board, San Francisco Bay Region, is a public agency of the State of California created by the Legislature in California Water Code §§ 13200 *et seq.* The Regional Board is responsible for implementing the Porter-Cologne Water Quality Control Act, California Water Code §§ 13000, *et seq.*

9
10
11
12
13
14
15
16
17
18
JURISDICTION, EXHAUSTION, AND VENUE

3. This Court has jurisdiction under California Code of Civil Procedure § 1094.5, and California Water Code §13330.

4. Mayhew has either exhausted its administrative remedies or the available administrative remedy is inadequate, unavailable, futile or unfair. Mayhew has no other plain, speedy, and adequate remedy in the ordinary course of law. Thus, proceeding to judicial review of the issues is appropriate.

5. Venue for this action properly lies in the Superior Court of California in and for the County of Contra Costa pursuant to California Water Code § 13361(b).

19
20
21
22
23
24
25
26
27
28
STANDARD OF REVIEW

6. Pursuant to California Code of Civil Procedure §1094.5(c), the inquiry in this case extends to whether the Regional Board proceeded without or in excess of its jurisdiction, and whether, in connection with the challenged Order of December 14, 2006, there was any prejudicial abuse of discretion. Abuse of discretion is established where the Regional Board has not proceeded in a manner required by law, where the Order is not supported by the findings, or where the findings are not supported by the evidence. Pursuant to California Water Code §13330(d), this "Court shall exercise its independent judgment on the evidence" in reviewing the Regional Board's order. Thus, under California Code of Civil Procedure section 1094.5(c), "abuse of discretion is established if the Court determines that the findings are not supported by the weight of the evidence."

FACTUAL BACKGROUND

7. Mayhew is a small business whose sole activity is operating commercial rental property at 3301, 3317, and 3333 Vincent Road, Pleasant Hill, California. The property, known as "Mayhew Center," comprises approximately three-acres. Mayhew Center owns the property at 3301 and 3317 Vincent Road, and Vincent Hook Ranch, LLC, owns the property at 3333 Vincent Road. Mayhew purchased 3301 and 3317 Vincent Road and leased 3333 Vincent Road in the early 1990s.

8. Prior to the 1970s, the property was used as an orchard. The buildings at the Mayhew Center were developed in the mid-1970s.

9. The property immediately west of and adjacent to Mayhew Center is owned by Walnut Creek Manor, 81 Mayhew Way, Pleasant Hill, California. The site is a sprawling residential campus nearly ten times the size of Mayhew Center. Walnut Creek Manor, Mayhew Center, and two parcels located at 3343 and 3355 Vincent Road (hereafter "Cuff Property") are treated by the Regional Board as the "Vincent Road Properties" and filed under a single file number (Regional Board File No. 07S0183). the Regional Board also refers to these properties as upgradient of and relevant to the "Hookston Station" property, Regional Board File Number 07S0156. Some documents relating to the Vincent Road properties are in the Hookston Station file, and some documents relating to the Hookston Station properties are in the Vincent Road Properties file.

10. Walnut Creek Manor and Mayhew Center share approximately 500 feet of property boundary. There is a fence running the length of the boundary. On the Walnut Creek Manor side of the fence are several maintenance buildings, a cooling tower, parking areas, and storage, repair, disposal, and maintenance areas. An aerial photograph showing the Walnut Creek Manor and Mayhew Center properties is attached hereto as Exhibit A and incorporated herein by reference.

11. During an investigation ordered by the Regional Board at Walnut Creek Manor's property, Walnut Creek Manor filed a report with the Regional Board noting PCE pollution on

1 Walnut Creek Manor's border with Mayhew Center and suggesting, without evidence, that
2 Mayhew Center was the source of the PCE.

3 12. In an effort to clarify potential migration from Walnut Creek Manor to Mayhew
4 Center, Mayhew voluntarily conducted an informal investigation of its property. The
5 investigation revealed elevated PCE concentrations in soil near the boundary with Walnut Creek
6 Manor.

7 13. Groundwater flows in a North-Eastern direction, meaning that it would flow at an
8 angle from Walnut Creek Manor to Mayhew Center. Walnut Creek Manor is therefore the up-
9 gradient property owner, and groundwater flows down-gradient.

10 14. Walnut Creek Manor has done a partial investigation, but has never completed its
11 investigation. Walnut Creek Manor's initial investigation drilled a few deep borings on Walnut
12 Creek Manor, along with three deep borings on Mayhew's property at locations designed to
13 detect migration from potential PCE sources within Walnut Creek Manor's property and near the
14 property line. Walnut Creek Manor's consultant recommended further deep borings beneath
15 Walnut Creek Manor's maintenance and storage sheds near the boundary with Mayhew Center,
16 including groundwater testing. That work has never been completed at Walnut Creek Manor.

17 15. The Regional Board later permitted Walnut Creek Manor to take a phased
18 approach to the additional investigations, permitting limited shallow soil work with the express
19 *proviso* that Walnut Creek Manor would have to do deeper borings and groundwater sampling if
20 it found PCE in the shallow soil samples at Walnut Creek Manor. Walnut Creek Manor found
21 PCE in the shallow soil samples at Walnut Creek Manor, but has never followed up with the
22 deeper borings or groundwater sampling. Walnut Creek Manor is under order from the Regional
23 Board to conduct such sampling and other sampling for PCE and other contaminants in a larger
24 are of the Walnut Creek Manor site upgradient of Mayhew Center.

25 16. Before Walnut Creek Manor had conducted the initial investigation described
26 above, the Regional Board issued a February 11, 2005, letter to Mayhew. That letter explained
27 that the Regional Board would "suspend the due date for a work plan" from Mayhew "until a site
28 investigation is completed at the up-gradient property, Walnut Creek Manor." Board staff

1 confirmed this directive at an in-person meeting on August 2, 2005. Internal memoranda between
2 Regional Board staff also confirms that Mayhew's investigation would take place "After Walnut
3 Creek Manor completes their investigation and if VOCs are not found beyond the fenceline. . . ."

4 17. Despite its written commitment, confirmed at the in-person meeting and by
5 internal staff memoranda, the Regional Board suddenly reversed course and ordered Mayhew to
6 submit a site plan and conduct a costly investigation, even though Walnut Creek Manor has never
7 completed its site investigation.

8 18. It will be impossible for Mayhew to conduct a meaningful evaluation of the soil
9 and groundwater on its property until the investigation is complete at the more likely, up-gradient
10 source of PCE at Walnut Creek Manor.

11 19. The Regional Board has repeatedly acknowledged in writing that, to the extent
12 there were any PCE releases, they would have occurred some time prior to 1983, more than ten
13 years before the current Mayhew owners purchased the property. Thus, the current Mayhew
14 owners have never discharged PCE at the property.

15 20. Prior to the discovery of PCE at the property, Mayhew was a modestly profitable
16 business with cash reserves.

17 21. Mayhew has exhausted the vast majority of its reserves paying attorneys and
18 consultants to conduct work in response to the PCE situation on the property. Further, nearly all
19 of the income generated by these properties goes to paying the attorneys and consultants.

20 22. If required to prepare and fully execute the work plan as ordered in the Regional
21 Board's December 14, 2006, Order to Mayhew, it is likely that Mayhew will become financially
22 insolvent. This is particularly so in light of the fact that this work plan is likely to be the first of
23 many.

24 23. Without a stay pending this litigation, Mayhew will be put to the Hobson's choice
25 of risking criminal penalties and driving itself into bankruptcy by severe fines, or driving itself
26 into bankruptcy by complying with the December 14, 2006, Order.

27 24. If Mayhew goes bankrupt, Mayhew's employees and owners will be harmed, and
28 it is likely that the property will be sold and the current tenants kicked out. Those current tenants

1 are small businesses themselves, and a major disruption of their operations or inability to find
2 new locations could doom their businesses and threaten the jobs of the employees working there.

3 25. On or about January 16, 2007, Mayhew filed a petition for review of the Regional
4 Board's December 14, 2006, Order with the State Water Resources Control Board. On January
5 19, 2007, Mayhew filed a request for a stay of the December 14, 2006, Order with the Regional
6 Board. Mayhew raised each and every issue raised in the present petition in its petition and/or
7 request for stay to the State Water Resources Board Control Board. Alternatively, it would have
8 been futile to raise to the State Board and/or Regional Board each and every issue raised in this
9 petition.

10 26. Because the December 14th, 2006, Order to Mayhew only gave Mayhew 30 days
11 to respond with a work plan, Mayhew was forced to comply with the Order before it could be
12 reviewed by the State Board and before the State Board could act on Mayhew's requested stay.
13 Mayhew's only alternative would have been to violate the Order and face \$5,000 per day in
14 penalties, which is not a realistic alternative. Even now, Mayhew is forced to continually comply
15 with the Order because Mayhew must prepare work plans and execute those work plans under
16 threat of penalty and administrative enforcement.

17 27. Mayhew has never been granted a hearing or even a meeting with the Regional
18 Board or its staff with respect to the propriety of the December 14, 2006, Order.

19 28. The State Board's Chief Counsel summarily denied Mayhew's Petition for Review
20 of the December 14, 2006, Order, in a letter dated March 8, 2007. Mayhew has thus exhausted its
21 administrative remedies.

22 **FIRST CAUSE OF ACTION**
23 **(Cal. Code Civ. Proc. § 1094.5)**

24 29. Petitioner re-alleges paragraphs 1 through 28, and incorporates them by reference.

25 30. In issuing its December 14, 2006, Order to Mayhew, the Regional Board acted
26 contrary to California Water Code sections 13267 and 13330, and California Code of Civil
27 Procedure section 1094.5.
28

1 31. The Regional Board recognizes that the current owners of the Mayhew property
2 have never “discharged” any PCE on its property. On information and belief, Petitioner alleges
3 there has never been a discharge of PCE at the Mayhew property.

4 32. In addition, the Regional Board proceeded in excess of its jurisdiction and lacks
5 authority to issue an order to Mayhew Center, LLC, under California Water Code § 13267,
6 because any discharge took place more than a decade before Mayhew Center, LLC, purchased the
7 property. Mayhew is thus not a discharger and there is no ground for suspecting that Mayhew is a
8 discharger.

9 33. Even assuming that Mayhew could be considered a discharger under California
10 Water Code § 13267, the weight of the evidence in the record overwhelmingly points to Walnut
11 Creek Manor as the likely source of PCE.

12 34. In issuing the December 14, 2006, Order to Mayhew, the Regional Board relied
13 upon evidence on which responsible persons would not rely in the conduct of serious affairs, in
14 violation of California Water Code sections 13267(b)(1) and (e).

15 35. Further, the December 14, 2006, Order to Mayhew violates California Water Code
16 section 13267’s requirement to ensure that the burden of any Order, including costs of requested
17 reports, must bear a reasonable relationship to the need for the reports and a reasonable
18 relationship to the benefits obtained from the reports. It is not cost-effective to spend tens of
19 thousands of dollars on a downgradient investigation when the upgradient investigation is not yet
20 complete, particularly where there has been no source of contamination identified at the
21 downgradient property. It is also impermissible under California Water Code section 13267 to
22 force the likely *victim* of migrating contamination to conduct an investigation when the
23 upgradient, probable polluter has not yet completed its investigation. In addition, the December
24 14, 2006, Order to Mayhew contains unsupported estimates of costs to write a workplan and fails
25 to consider or even mention the costs of executing the plan.

26 36. In issuing the December 14, 2006, Order to Mayhew, the Regional Board violated
27 its internal policy and regulation, embodied in State Water Resources Control Board Resolution
28 92-49 and incorporated by reference into the San Francisco Basin Plan, to make “a reasonable

1 effort to identify the dischargers associated with the discharge.” Instead, the Regional Board has
2 acted in a “shoot first, ask questions later” manner, ordering Mayhew to conduct a costly
3 investigation even though it is likely the *victim* of an up-gradient PCE discharge.

4 37. The December 14, 2006, Order to Mayhew is part of a pattern of illogical and
5 internally inconsistent actions by the Regional Board with respect to the PCE situation at the
6 Mayhew and Walnut Creek Manor sites. The Regional Board and its staff has acted inconsistent
7 with its written and oral communications to Mayhew Center, LLC.

8 38. Throughout its involvement with Mayhew, the Regional Board has acted as though
9 it has a pre-determined agenda to require Mayhew to do investigation and cleanup at the property
10 regardless of the facts and/or evidence before the Board and its staff.

11 39. The Regional Board has consistently withheld material information from Mayhew
12 Center, LLC, and the public.

13 40. In issuing the December 14, 2006, Order to Mayhew, the Regional Board relied on
14 bare speculation of a possibility of a discharge at Mayhew Center without any evidence to support
15 any identification of any source of a discharge of PCE at Mayhew Center. The Order also
16 ignored and unfairly and illogically discounted reliable evidence indicating that Mayhew is not
17 the source.

18 41. The December 14, 2006, Order violates Resolution 92-49’s mandate to carry out
19 cost effective investigation and remediation; particularly Resolution 92-49’s command to “focus
20 investigative activities on locations and wastes or materials handled at the site.” No such
21 locations or materials have been identified at Mayhew Center.

22 42. The December 14, 2006, Order violates Resolution 92-49’s policy of conducting
23 “progressive” or “phased” investigations. A phased investigation would look first to the
24 upgradient, likely source of PCE at Walnut Creek Manor’s campus maintenance facility and then
25 work its way downgradient.

26 43. Regional Board staff have negligently, recklessly, and/or intentionally made false
27 statements about prior activities on Mayhew’s property. For example, Regional Board staff stated
28 in a written communication in September of 2005 that one of the tenants at the property prior to

1 Mayhew's ownership was a "known user of PCE." There was no factual basis for this statement
2 and the Regional Board has since acknowledged that it is incorrect, but the Regional Board
3 refuses to correct this statement in writing. This statement continues to harm Mayhew and has
4 been repeatedly used to Mayhew's detriment.

5 44. Mayhew has suffered and is suffering irreparable and other harm based on the
6 Regional Board's December 14, 2006, Order. Mayhew will continue to suffer such irreparable
7 and other harm until the Order is stayed and/or set aside. Mayhew lacks any adequate remedy at
8 law.

9 SECOND CAUSE OF ACTION

10 (Due Process of Law)

11 45. Mayhew re-alleges paragraphs 1 through 44, and incorporates them by reference.

12 46. The Regional Board's December 14, 2006, Order deprives Mayhew of liberty and
13 property.

14 47. The Regional Board staff issued the December 14, 2006, Order without a hearing,
15 the right to confrontation, and/or cross-examination.

16 48. The California Constitution recognizes a due process liberty interest in freedom
17 from arbitrary adjudicative procedures. This includes the right to respond orally before a
18 responsible official and to introduce factors into the decision-making process that might
19 otherwise not be considered.

20 49. Given the significant property and liberty interests at stake, due process requires a
21 hearing before a neutral officer and/or the right to confrontation, cross-examination, and other
22 formal hearing rights. But Mayhew was never given an opportunity to orally engage the Board or
23 its staff in any setting, formal or otherwise. The Regional Board and its staff have thus
24 wrongfully depriving Mayhew of its right to due process of law

25 50. By requiring action on the December 14, 2006, Order within 30 days, the Regional
26 Board rendered these due process protections meaningless because Regional Board's Order to
27 Mayhew takes effect before any kind of an opportunity for a hearing or review of any kind.
28

1 60. An injunction prohibiting the Regional Board from issuing any further orders to
2 Mayhew with respect to the property at issue in this litigation during the term of this litigation,
3 without the prior approval of this Court;

4 61. An injunction prohibiting the Regional Board from enforcing its December 14,
5 2006, Order to Mayhew Center;

6 62. An order declaring that the Regional Board's actions in this case denied Mayhew
7 its state and/or federally guaranteed rights to due process of law;

8 63. An order enjoining the Regional Board from issuing further orders to Mayhew
9 without first holding a hearing before a neutral decision-maker, with rights to confrontation,
10 cross-examination, and other formal hearing rights;

11 64. An Order requiring Respondent to pay Mayhew's cost of suit and attorney's Fees;

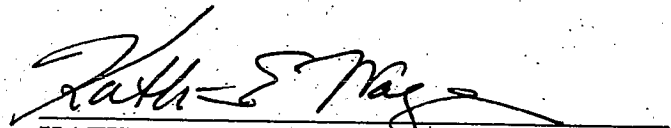
12 65. Any other Relief that the court deems just and proper.

13
14 Respectfully submitted,

15 DOWNEY BRAND LLP

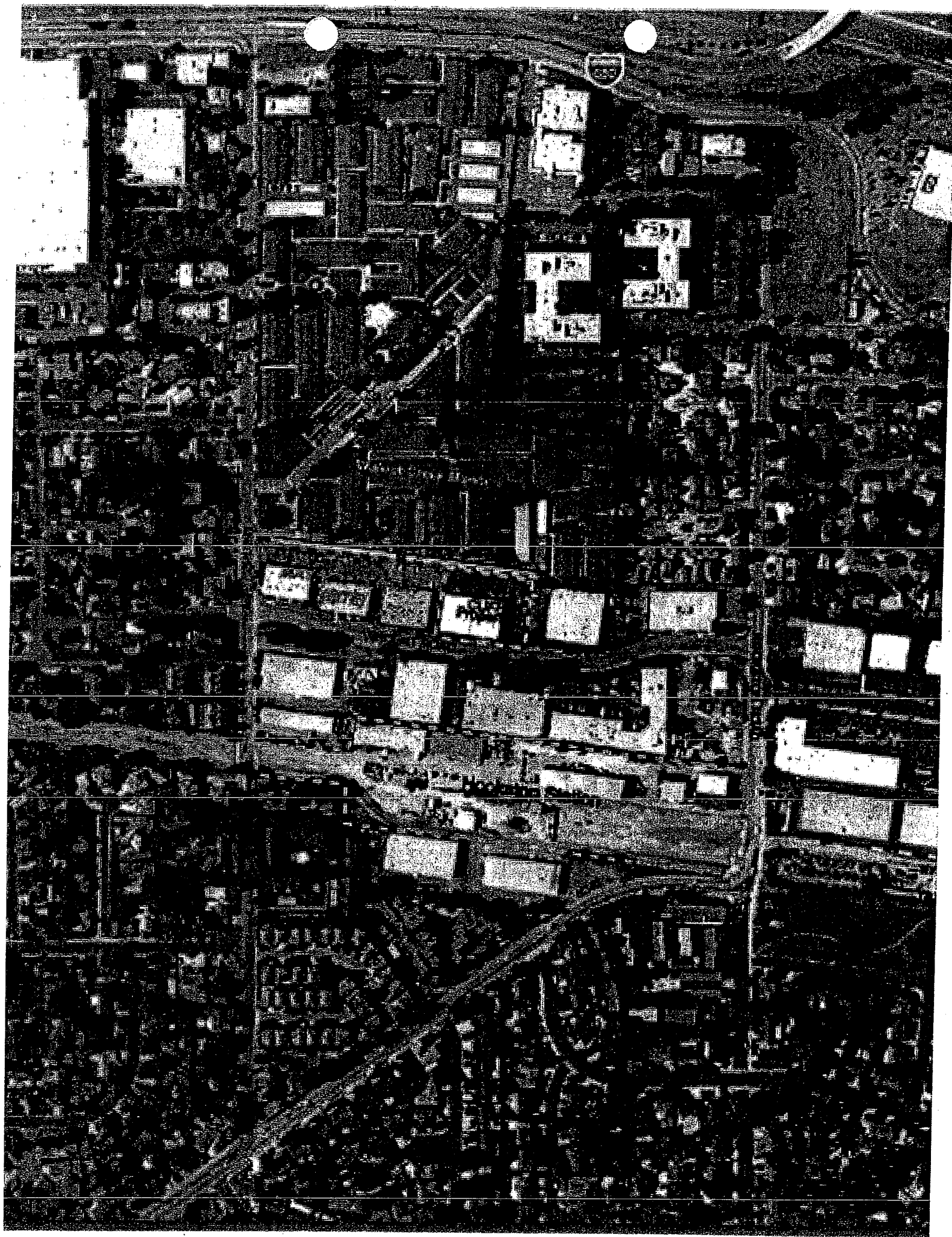
16
17 DATED: April 5, 2007

By:



KATHARINE E. WAGNER
Attorneys for Petitioner,
MAYHEW CENTER, LLC

EXHIBIT A



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

I am the Managing Member of Petitioner and Plaintiff, MAYHEW CENTER, LLC, and am authorized to execute this verification on Plaintiff and Petitioner's behalf. I have read the foregoing Petition and Complaint and am familiar with its contents. The facts recited in the Petition and Complaint are true to the best of my personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: April 3, 2007



DEAN R. DUNIVAN
Managing Member, MAYHEW CENTER, LLC

EXHIBIT D

January 16, 2007

VIA HAND DELIVERY

Elizabeth Miller Jennings
Senior Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
The Joe Serna Jr./Cal EPA Building
1001 I Street, 22nd Floor
Sacramento, California 95814

Re: **Petition for Review in the Matter of Mayhew Center, LLC's Petition for Review of
San Francisco Regional Water Quality Control Board's Adopting an Order
Requiring Mayhew Center to conduct Action at 3301-3341 Vincent Road, Pleasant
Hill, CA (Regional Board File No. 07S0183)**

Dear Ms. Jennings

Enclosed please find the Petition for Review of Mayhew Center, LLC in the above matter.
Thank you for your attention to this matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

DOWNEY BRAND LLP



Katharine E. Wagner

824403.1

cc: Bruce Wolfe, Executive Officer, SFRWQCB

1 DOWNEY BRAND LLP
2 KATHARINE E. WAGNER (Bar No. 119429)
3 GREGORY T. BRODERICK (Bar No. 220871)
4 555 Capitol Mall, Tenth Floor
5 Sacramento, CA 95814-4686
6 Telephone: (916) 444-1000
7 Facsimile: (916) 444-2100

8 Attorneys for Petitioner
9 MAYHEW CENTER, LLC
10

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of Mayhew Center, LLC's,
Petition for Review of Action by the San
Francisco Bay Regional Water Quality
Control Board Adopting An Order
Directing Mayhew Center, LLC, to
Conduct Action on Its Property at 3301-
3341 Vincent Road, Pleasant Hill, CA
(File No. 07S0183),

**PETITION FOR REVIEW;
PRELIMINARY POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION (WATER CODE SECTION
13320)**

INTRODUCTION

In accordance with Water Code section 13320(a), Petitioner Mayhew Center, LLC, ("Mayhew") hereby petitions the State Water Resources Control Board ("SWRCB") for review of the Regional Water Quality Control Board, San Francisco Bay Region, ("Regional Board") Order of December 14, 2006 ("Mayhew Order"). A copy of the Mayhew Order is attached to this petition as Exhibit A. The issues and a summary of the bases for this Petition follow, though Mayhew reserves the right to file a more detailed memorandum in support of this Petition at such time as the full administrative record and other additional materials are available.¹

This appeal rests on the non-controversial proposition that pollution moves from

¹ The State Water Board's regulations require submission of a memorandum of points and authorities in support of a petition, and this document is intended to serve as a preliminary memorandum. However, it is impossible to prepare a complete memorandum in the absence of the complete administrative record, which is not yet available.

1 upgradient sources to downgradient properties, and that any study of downgradient impacts will
2 be ineffective until the upgradient pollution and potential sources are characterized. Despite these
3 simple, rational principles, the Regional Board continues to take action that suggests that owners
4 of the downgradient, PCE-impacted properties are presumed dischargers until they can prove
5 beyond a shadow of a doubt that they are not.

6 Mayhew leases office space for small businesses on its property, located upgradient of the
7 Hookston Station site (File No. 7S0156) and downgradient of the Walnut Creek Manor campus.
8 Investigations at Hookston Station revealed PCE in the soil and groundwater at the site.
9 According to the Regional Board's Order, spilled solvents of this kind typically migrate
10 downward, dissolve into groundwater, and move in the direction of groundwater flow. Tests on
11 the Hookston Station site revealed PCE and associated breakdown products, and the Regional
12 Board looked to some properties upgradient of Hookston Station as potential sources.

13 There is no indication that PCE was ever used at the Mayhew property or that any PCE
14 contamination at the Mayhew property is related to the Hookston Station site. But there are
15 substantial indications that PCE was used in connection with a maintenance facility or a 35-year
16 old abandoned UST on the Walnut Creek Manor property. In a spirit of cooperation, Mayhew
17 conducted voluntary testing on its property. Those tests showed elevated concentrations of PCE
18 at the Mayhew site *near the border* of the upgradient Walnut Creek Manor site.

19 In contrast to the small, 3-acre Mayhew site, Walnut Creek Manor is a sprawling campus
20 of housing and other uses, nearly ten times the size of Mayhew. As PCE was commonly used as
21 a paint stripper or to degrease automotive parts and metal tools, a maintenance facility for a
22 campus of this size is likely to have used PCE during the last four decades. The "hot spot" for the
23 PCE is near the border of the two properties, near a maintenance facility on the Walnut Creek
24 Manor property that seems a likely source of the degreaser PCE. It seemed only logical to
25 Mayhew that the upgradient Walnut Creek Manor campus was the source. Initially, the Regional
26 Board took the rational position that Walnut Creek Manor should characterize the pollution on its
27 property before Mayhew is required to determine the extent of the pollution that likely flowed
28 from the Walnut Creek Manor campus to its property. Then, inexplicably and without expressly

1 countermanding its prior written agreement that Walnut Creek Manor should characterize its PCE
2 contamination first, the Regional Board ordered Mayhew to conduct expensive testing on its
3 property.

4 Mayhew explained that testing should occur first on the Walnut Creek Manor site, as all
5 evidence indicated that it was the source of the PCE on both Mayhew's property and at the
6 Hookston station site. If nothing else, Mayhew contended, the Regional Board should have
7 required Walnut Creek Manor to complete a full site history, including information from Walnut
8 Creek Manor personnel with personal knowledge of the activities that took place there in the
9 1970s, 1980s, and 1990s.² Mayhew also explained that investigations at Mayhew's property were
10 unlikely to be fruitful given the lack of information about the upgradient property.

11 On December 14, 2006, the Regional Board finally did order Walnut Creek Manor to
12 conduct its investigations after an appeal to this Board, several letters, and multiple detailed
13 explanations from Mayhew's consultants. But the Regional Board *simultaneously* issued a new
14 order to Mayhew. The December 14, 2006, Order requires Mayhew to submit a soil and
15 groundwater testing plan by January 26, 2007. The Order expressly acknowledges that this work
16 plan, expected to cost at least \$10,000, is probably the first of many for this site. The Order fails
17 entirely to address Mayhew's contention that any testing that occurs on Mayhew's property is
18 unlikely to be of much value until testing at the Walnut Creek Manor site is completed.

19 Mayhew cannot fathom why the Regional Board has ordered it to conduct costly testing
20 on its property at this time. First, it is obvious to those possessing common sense that Walnut
21 Creek Manor is the most likely source of the PCE. The Regional Board itself has found that PCE
22 was likely used at the Walnut Creek Manor campus in "fuel and chemical storage, equipment
23 maintenance," and other activities at the site.³ These activities were historically located near
24 Walnut Creek Manor's border with Mayhew, and the Regional Board's order recognized that
25 Walnut Creek Manor's PCE plume could be contributing to pollution at downgradient sites.⁴

26 ² See May 15, 2006, Letter from Katharine A. Wagner to Bruce H. Wolf, attached hereto as Exhibit D, at 2.

27 ³ See December 14, 2006, Order to Walnut Creek Manor ("Walnut Creek Manor Order," attached hereto as Exhibit
28 B, at 3.

⁴ See *id.*

1 There is PCE contamination at Mayhew's site, but no evidence indicating that PCE was ever used
2 there and groundwater flows in the area indicate that a release of PCEs at the Walnut Creek
3 Manor campus would flow, over time, across Mayhew's property. But the Regional Board will
4 not be moved to defer action against Mayhew, insisting that Mayhew Center must be considered a
5 PCE source until it can prove beyond all doubt that it was not. This speculation and improper
6 burden shifting does not justify requiring a likely *victim* of PCE pollution to conduct a costly,
7 full-scale, simultaneous investigation, parallel to what is required of the upgradient, likely source
8 of PCE at Walnut Creek Manor.

9 The Regional Board's decision is inappropriate, improper, internally inconsistent, and in
10 conflict with state statutes and SWRCB regulations and resolutions. For these reasons, and for
11 the reasons more fully set forth below, Mayhew requests that this Board vacate the December 14,
12 2006, Order. Further, given the Regional Board's apparent willful blindness and recalcitrance in
13 this case, Order that no further investigation by Mayhew is required until new information
14 indicates that an investigation would be both appropriate and fruitful.

15 **1. NAME AND ADDRESS OF PETITIONER:**

16 Mayhew Center, LLC
17 Attn: Dean Dunivan
18 3317 Pleasant Hill Rd.
19 Pleasant Hill, CA 94523
20 ddunivan@yahoo.com

21 All materials and documents generated in connection with this Petition for Review should
22 be provided to the counsel of record for Mayhew at the following addresses:

23 Katharine E. Wagner
24 Downey Brand LLP
25 555 Capitol Mall, 10th Floor
26 Sacramento, California 95814
27 Telephone: (916) 444-1000
28 kwagner@downeybrand.com

1 2. **THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE**
2 **BOARD IS REQUESTED TO REVIEW:**

3 Mayhew seeks review and set aside of the San Francisco Bay Regional Board's December
4 14, 2006, Order. Specifically, the Order requires Mayhew to submit a work plan designed to
5 characterize the soil and groundwater on and beneath the Mayhew site by January 26, 2007.

6 3. **THE DATE ON WHICH THE REGIONAL BOARD ACTED:**

7 The San Francisco Bay Regional Board issued its order December 14, 2006.

8 4. **A STATEMENT OF THE REASONS THE ACTION WAS INAPPROPRIATE OR**
9 **IMPROPER:**

10 As explained above, Mayhew's property is sandwiched between a likely, upgradient
11 source (Walnut Creek Manor's UST and maintenance areas) and a downgradient impacted
12 property (Hookston Station). Current studies and historical information strongly suggest that
13 Walnut Creek Manor's campus is the source of the PCE, likely from a UST and/or a maintenance
14 area close to the border of the Mayhew property. The known pollution distribution at Mayhew
15 and Hookston Station is consistent with the groundwater flow from Walnut Creek Manor.

16 Common-sense indicates that the sprawling Walnut Creek Manor campus is the source,
17 and that the comparatively tiny Mayhew property is a victim. Originally, the Regional Board
18 concluded just that, and confirmed that Walnut Creek Manor would first have to characterize the
19 pollution from its source before Mayhew would have to characterize its property. After all,
20 Walnut Creek Manor's study is likely to show that it is the source of the PCE at downgradient
21 properties, a circumstance which would require Walnut Creek Manor—not Mayhew—to
22 investigate Mayhew's property. But, for a reason that has never been explained, the Regional
23 Board reversed course and ordered Mayhew to study its property before Mayhew had the required
24 information from the Walnut Creek Manor investigation.

25 After Mayhew's consultants and lawyers spilled much ink, the Regional Board agreed to
26 split the baby and ordered simultaneous investigations of the Mayhew site and the Walnut Creek
27 Manor campus. This investigation will cost Mayhew, a small business, a significant amount of
28

1 money but will serve almost no purpose. Given the likelihood that the Walnut Creek Manor
2 campus is the source, the investigation at the Mayhew property is likely to yield nothing more
3 than would a blind pig searching for acorns. Until the distribution from the upgradient Walnut
4 Creek Manor source is adequately characterized and better understood, Mayhew will be digging
5 random holes hoping to get lucky—to the extent that finding someone else's PCE on your
6 property is "getting lucky," that is.

7 The SWRCB should reverse the Regional Board's December 14, 2006, Order. First, the
8 Regional Board changed position on *when* Mayhew should investigate its property in the middle
9 of the process without explanation. Second, the Regional Board's characterization of Mayhew as
10 a discharger lacks support in the record. Aside from the presence of PCE on the property—likely
11 explained by the upgradient property owner's historic PCE-related operations—there is almost no
12 reason to believe that Mayhew is a source. The Regional Board's reliance on the naked
13 possibility that a former tenant at Mayhew's property could have discharged PCE years before
14 Mayhew bought the property is insufficient to justify the great expense the Regional Board would
15 foist on Mayhew, particularly in light of detailed, reliable evidence from past occupants and from
16 Mayhew uniformly confirming that they never used PCE. Finally, the Regional Board's Order is
17 inconsistent with California Water Code § 13267, Resolution 92-49, and other statutes,
18 regulations, and policies of the SWRCB. The Regional Board's statement that the \$10,000 cost is
19 reasonable is mistaken, as (a) the study cannot be effective without first characterizing the
20 bordering, upgradient pollution at the Walnut Creek Manner campus, and (b) the \$10,000 was
21 roughly estimated and for costs of preparing a plan, not performing the study.

22 A. **The Regional Board Order Labeling Mayhew a "Discharger" Lacks Support**
23 **in the Record**

24 Section 13267 does not authorize the Regional Board to order investigations *carte*
25 *blanche*. Rather, that authority is limited to a person "who has discharged, discharges, or is
26 suspected of having discharged or discharging, or who proposes to discharge waste within its
27 region."⁵ In making its decisions, the Board must rely on "relevant evidence,"⁶ which the

28 ⁵ Cal. Water Code § 13267(b)(1).

1 statutory scheme defines as anything “on which responsible persons are accustomed to rely in the
2 conduct of serious affairs.”⁷ Resolution 92-49 confirms this understanding, and includes a non-
3 exhaustive list of ten routine forms of evidence that the Regional Board may use.⁸ Here, the
4 Regional Board determined that Mayhew is a discharger or suspected discharger by relying on the
5 barest possibility of a discharge and ignoring or unfairly discounting the overwhelming evidence
6 indicating that Mayhew is not the source. This decision is arbitrary and capricious, violates
7 section 13267, and conflicts with this Board’s formally adopted policies.

8 First, the record is entirely devoid of evidence that would even suggest that Mayhew has
9 ever discharged PCE on the site. It is undisputed that Mayhew’s only connection with PCE on
10 this site is that Mayhew happens to own the property. That alone should be sufficient to absolve
11 Mayhew of responsibility. Though the section 13267 does not define “discharger” or
12 “discharge,” other statutory schemes using that term require *active* participation in the discharge.
13 Under the federal Clean Water Act, for example, a discharge only occurs when there is the
14 “addition of a pollutant.”⁹ That might include conveying already-polluted water to another
15 water,¹⁰ but *some* action by the discharger is required. The California Court of Appeal has also
16 held that the term “discharge,” as used in Proposition 65, does *not* include passive migration.¹¹
17 Further, the dictionary definitions of the term discharge “have a common active concept: the
18 movement from a place of confinement to a place without confinement.”¹² However, the
19 SWRCB has held that the term “discharge” in section 13267 *does* cover passive migration.¹³
20 Given these prior orders, Mayhew does not wish to spend an inordinate amount of time briefing

21 ⁶ *Id.*

22 ⁷ *Id.* at § 13267(e).

23 ⁸ See Resolution 92-49 at ¶ I.A.

24 ⁹ 33 U.S.C. § 1362(12).

25 ¹⁰ See South Florida Water Management Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 103-04 (2004).

26 ¹¹ See Consumer Advocacy Group, Inc. v. Exxon Mobil Corp., 104 Cal.App.4th 438, 440 128 Cal.Rptr.2d 454
(Cal.App. 2 Dist. 2002).

27 ¹² *Id.* at 446.

28 ¹³ See Zoecon Corporation, Order No. 86-2 (SWRCB 1986) (Explaining that the term “discharge” includes the
“ongoing movement of waste from the soil into the groundwater, and from the groundwater to unpolluted
groundwater”); see also Arthur Spitzer, et al., Order No. WQ-89-8 (SWRCB 1989).

1 the issue. Rather, Mayhew requests that this Board reexamine those 15-year old Orders in light
2 of new case law and permit Mayhew to file a supplemental brief on the subject if the Board is
3 interested in revisiting the issue.

4 Even assuming that the term "discharge" applies to the passive migration of PCE, there is
5 no indication that anyone has ever discharged anything at the Mayhew property. Rather, the vast
6 weight of the evidence suggests that the upgradient Walnut Creek Manor campus is the source.
7 First, the Regional Board has determined that Walnut Creek Manor is at least a source of PCE,¹⁴
8 ordering it to conduct an investigation on its property.¹⁵ The Order issued to Walnut Creek
9 Manor indicates that pollution near its boundary with Mayhew revealed high levels of PCE and
10 that sampling downgradient—just across the border onto Mayhew's property—suggested that
11 Walnut Creek Manor was the source.¹⁶ The Order to Walnut Creek Manor also explains that the
12 PCE pollution is clustered near Walnut Creek Manor's former maintenance facility and notes the
13 discovery of a previously concealed 5,000 gallon UST that was in operation from 1963 to 1998
14 near the PCE "hot spot."¹⁷ This information, along with the direction of groundwater flow
15 beneath the properties, strongly suggests that the upgradient Walnut Creek Manor campus is the
16 source.

17 In contrast with the comparatively strong evidence of PCE use at the Walnut Creek Manor
18 campus is the paucity of evidence that PCE was ever used at Mayhew's site. The only indication
19 that PCE might have been used is that printed circuit boards were briefly manufactured by
20 EtchTek at Mayhew's site in the early 1980s.¹⁸ Some circuit board manufacturers apparently
21 used PCE in the final stages of manufacturing. But a detailed declaration from former EtchTek
22 office Kenneth R. Beard refutes the Regional Board's assumption that their process used PCE.¹⁹
23

24 ¹⁴ See Walnut Creek Manor Order at p. 3 ("Your property is a suspected source of PCE . . .").

25 ¹⁵ See *id.*

26 ¹⁶ See *id.* at p. 2-3.

27 ¹⁷ See *id.* at p.3

28 ¹⁸ See Mayhew Order at p. 3.

¹⁹ See April 14, 2006, Letter of Kenneth R. Beard, attached hereto as Exhibit C ("Beard Declaration").

1 Mr. Beard's declaration conclusively states that the manufacturing process *never* used PCE.²⁰
2 The Regional Board irrationally discounts Mr. Beard's declaration as "recollection of operations
3 that took place about 25 years ago," implying that his declaration is faulty or unreliable.²¹ But the
4 face of the declaration indicates its reliability, recalling with detail several of the solvents that
5 were used *instead* of PCE. It also notes what each of the buildings at the site were used for,
6 recites corporate policies, and notes other matters on which their recollection is "dim" or about
7 which they had no personal knowledge.²² But Mr. Beard's declaration is crystal clear: EtchTek
8 never used PCE.

9 Mr. Beard's declaration also answers the Regional Board's wild conjecture about a
10 "structure" on the Mayhew property which the Regional Board speculates may have been a waste
11 treatment facility for the computer manufacturing operation.²³ That "structure" is no longer at the
12 site and is observable only in aerial photographs, but Mr. Beard specifically recalls that it was a
13 canopy covering the dumpsters at the property.²⁴ Mr. Beard also recalled that a fuzzy blot on the
14 aerial photographs—which the Regional Board suggests *might* be a wastewater treatment plant—
15 was actually a truck-mounted fish tank once used by the property owner at his aquaculture facility
16 but occasionally stored at the site. Mr. Beard's recollection is buttressed by the fact that the
17 dumpsters currently at the site are located in the same place, that there is no evidence that there
18 was any piping to the "structure," and that EtchTek's sewer lines ran East of the buildings—
19 entirely the other direction.

20 The Regional Board admits that there is no proof that there was ever piping to the
21 "structure," but clings to its assumption by noting that *Mayhew* cannot prove that there was *never*
22 piping there.²⁵ This is a logical fallacy of the first order: the Regional Board is requiring *Mayhew*
23 to prove a negative. The burden of proof is on the Regional Board to support its suspicion that

24 ²⁰ See *id.* at p. 1.

25 ²¹ See *Mayhew Order* at p. 3.

26 ²² See *Beard Declaration* at pp. 1-2.

27 ²³ See *Mayhew Order* at p. 3.

28 ²⁴ See *Beard Declaration* at p. 1.

²⁵ See *Mayhew Order* at p. 3.

1 PCE was discharged at the Mayhew site. The Regional Board is thus left with bare speculation
2 and logical fallacies, promoting its wild theories in the face of Mr. Beard's cogent, self-verifying
3 declaration.

4 **B. The Regional Board Has Not Made A Reasonable Effort to Identify**
5 **Dischargers Associated with the Discharge**

6 The Regional Board Order also violated several directives contained in Resolution 92-49.
7 First, it has not made "a reasonable effort to identify the dischargers associated with the
8 discharge."²⁶ Rather, the Regional Board merely ordered several owners upgradient of PCE-
9 impacted property to do an investigation. Until the December 14th order to Walnut Creek Manor,
10 issued simultaneously with the order to Mayhew, the Regional Board had never required Walnut
11 Creek Manor to submit a complete site history, even after Mayhew's consultants produced
12 undisputed evidence of a previously undisclosed underground storage tank on the property.²⁷ Nor
13 has the Regional Board required or received any information from persons with personal
14 knowledge of Walnut Creek Manor's maintenance and underground storage tank operations.²⁸
15 As those are two likely sources of PCE, the Regional Board should require full disclosure of those
16 operations before requiring apparently innocent victims of pollution to shoulder the financial
17 burden of investigation.

18 The Regional Board's "shoot first, ask questions later" approach might be warranted in an
19 emergency situation, but the Regional Board order itself notes that the investigations have been
20 going on at related sites for more than 15 years. A proper, phased investigation at the upgradient
21 sites will not interfere with remediation at the Hookston Station site because the remedial plan for
22 Hookston Station is scheduled for adoption on January 23, 2007. Finally, the Regional Board
23 will not lose any enforcement or remediation options by forcing the logical, upgradient property
24 to conduct its investigation first. If Walnut Creek Manor is confirmed as the source, the Regional
25 Board may require it "to extend the investigation, and cleanup and abatement, to any location

26 Resolution 92-49 at ¶I.B.

27 See Letter of May 15, 2006, attached as Exhibit D, at p. 6.

28 See id.

1 affected by the discharge or threatened by the discharge.”²⁹ If the investigation unexpectedly
2 reveals that Walnut Creek Manor is not the source, then the Regional Board will have more
3 information which should help it locate and enforce against the true discharger. In the meantime,
4 the Hookston Station remediation will be going forward, as approval of its remedial plan is
5 imminent.³⁰ In short, there is no legitimate reason for the Regional Board’s failure to make a
6 reasonable effort to determine the discharger at this time.

7 Further, the SWRCB has declared that it “is not the intent of the State or Regional Boards
8 to allow dischargers, whose actions have caused . . . pollution, to avoid responsibilities for
9 cleanup.”³¹ But that is exactly what the Regional Board has done here. By ignoring the likely
10 source of pollutants—the upgradient property owner with a history of maintenance activities in
11 the area of the pollution—the Regional Board has foisted a significant portion of the investigative
12 costs onto Mayhew, the downgradient property owner whom the evidence suggests is the *victim*
13 of PCE pollution rather than the source.

14 The Regional Board’s Order to Mayhew is both unfair and unlawful. The SWRCB should
15 vacate that Order and enter its own order requiring the Mayhew property to be investigated only
16 after the Walnut Creek Manor campus is properly characterized.

17 **1. There are Substantial, Prejudicial Technical Errors and Omissions in Order**

18 While the Regional Board need not include the entire site history in an order, the technical
19 errors and omissions in the Mayhew Order are astonishing. First, the Regional Board omits most
20 of the technical information generated at the related sites, including the Hookston Station project,
21 Walnut Creek Manor, and the Cuff property. The Cuff property is immediately North of Mayhew
22 and contains the “hottest” PCE findings in the area. Worse, the Board’s Order omits the vast
23 majority of the relevant technical information at the *Mayhew* site, the very subject of the Order.
24

25
26 ²⁹ Id. at ¶ II.A.3.

27 ³⁰ See Staff Summary Report for January 23, 2007, meeting of the RWQCB, San Francisco Bay Region, attached
28 hereto as Exhibit M.

³¹ Id. at ¶ 26.

1 In light of these omissions, it is no wonder that the Mayhew Order makes serious errors in
2 describing conditions at the Mayhew site. For example, the Mayhew Order fails to mention that
3 the Hookston Station consultants offered to pay for a three-property soil vapor survey designed to
4 help clarify the pattern of PCE in the area. The Mayhew Order also fails to mention that Mayhew
5 agreed to the study and that the Regional Board approved it, but that Walnut Creek Manor and
6 Cuff blocked the study by refusing access to their properties. The Regional Board has never
7 acknowledged that Walnut Creek Manor and Cuff blocked this Board-approved, logical, and cost-
8 free survey, directly impeding a better understanding of conditions at these sites. The only logical
9 implication is that Cuff and Walnut Creek Manor have something to hide, which confirms the
10 other common-sense evidence indicating that these properties are likely sources of PCE.
11

12 Perhaps more damnable is the Regional Board's "selective" use of data in the Order. The
13 Order stresses a 2001 soil vapor study which, the Regional Board claims, found PCE "near your
14 property at 3301-3341 Vincent Road."³² The Mayhew Order also claims that groundwater at the
15 Hookston location showed elevated PCE. That sounds convincing, but the Mayhew Order
16 neglects to mention the specific findings of the Hookston Station investigation showing *no*
17 *impacts* from the Mayhew site.³³ The PCE referred to in the Order is due North of Mayhew
18 Center's premises, not in the well-documented groundwater flow direction to the Northeast.
19 Hookston Station's consultants have never identified Mayhew as a source of PCE.
20

21 The Hookston Station consultants summarized this site investigation more recently in their
22 August 2004 Remedial Investigation Report,³⁴ which the Regional Board's Order fails to
23 mention. Both that August 2004 report and the 2001 soil vapor findings include data showing a
24

25
26 ³² Mayhew Order at 1.

27 ³³ See August 2004 Remedial Investigation Report, Hookston Station Site, attached hereto as Exhibit E.

28 ³⁴ A copy of Figures 7-1 (copy of soil vapor findings) and 8-1 from the 2004 Investigation Report (showing groundwater data) are attached hereto as Exhibits F and G, respectively.

1 complete absence of PCE impacts in soil and groundwater immediately downgradient of the
2 Mayhew site. The 2001 passive soil vapor results show no detectible PCE vapor in the two
3 borings across the street Northeast of Mayhew Center Building 2, where EtchTek was formerly
4 located. The study shows that groundwater immediately to the East and Northeast (i.e.
5 downgradient) of Mayhew has *no detectible* PCE. Testing near the sewer trunk line near the exit
6 from the EtchTek Building shows no detection of PCE in groundwater. This undisputed data
7 confirms Mr. Beard's statements that EtchTek never used PCE in its operations. But the Regional
8 Board omitted this information indicating that EtchTek (and thus Mayhew) is not a source of
9 PCE, further exposing the Regional Board's decision to label Mayhew as a PCE discharger as
10 analysis by wish fulfillment.
11

12 The Mayhew Order also uses selective data at the Mayhew site to justify its far-fetched
13 hypotheses. The Regional Board speculates that an unknown "structure" (identified in Mr.
14 Beard's declaration as a canopy for dumpsters) might have been a source of PCE. But existing
15 data rebuts the Regional Board's supposition, which was first posited by Walnut Creek Manor.
16 The area near the "structure" has already been tested because it is extremely close to two borings
17 sampled by Walnut Creek Manor's consultant HE2 in May 2005. Soil concentrations reported for
18 boring B-4 and B-6 were extremely low.³⁵
19

20 The Order also fails to note that the "structure" was downgradient of the high-PCE areas
21 near the Walnut Creek Manor maintenance facilities and adjacent points at Mayhew Center. The
22 "structure" could not be the source area and appears to be nothing more than a pretext for
23 justifying the 13267 Order to Mayhew Center. Given the weight of the evidence, the Regional
24 Board is unjustified in sending Mayhew on a costly wild goose chase. Speculation that there
25 *could* have been a "structure" that *might* have had piping which *might* have been removed would
26

27 ³⁵ See Nov. 2, 2006, SOMA Addendum to Soil and Groundwater Evaluation at Mayhew Center, attached hereto as
28 Exhibit H, at p. 5.

1 be a highly questionable basis for a 13267 Order in the absence of all other information. In the
2 light of the overwhelming exculpatory evidence, it is simply untenable.

3 Another glaring error illustrates the lack of scientific analysis and quality control that has
4 pervaded this matter. The Mayhew Order trumpets that PCE was found in groundwater at boring
5 B-7, just over the Mayhew property line and that this groundwater occurred "at about 12 feet
6 below ground surface."³⁶ In fact, the Case Transfer report from one Regional Board staff member
7 to another described groundwater as existing at about 28 feet below surface.³⁷ Further, PCE in
8 soil is absent at Boring B-7 at the depth of 25 feet, *above the groundwater*, but is present in the
9 groundwater.³⁸ This strongly suggests that the PCE in groundwater at B-7 comes from an off-site
10 source: the nearby Walnut Creek Manor UST and maintenance/storage areas. Even Regional
11 Board staff admit that the concealed UST "is clearly something we would have wanted to know
12 last year when we were asking for a site investigation" from Walnut Creek Manor.³⁹

13
14
15 In its order to Walnut Creek Manor, the Regional Board required Walnut Creek Manor to
16 fill critical omissions in its past work and site history. Walnut Creek Manor insists that it is being
17 required to do a "third round of work," but it has never completed the first round of work. The
18 December 14, 2006, Walnut Creek Manor Order does not call for new work but requires Walnut
19 Creek Manor to complete the work that was already required. Walnut Creek Manor has never
20 investigated the UST at its site that was unlawfully abandoned for 14 years. That UST is
21 upgradient of several PCE and petroleum hydrocarbon hot spots, but was neither disclosed by
22 Walnut Creek Manor nor sampled when removed. It is difficult to understand why the Regional
23 Board continues to give credence to the fanciful speculation and result-oriented analysis of a
24

25
26 ³⁶ See Mayhew Order at 2.

27 ³⁷ See Nov. 2, 2006, SOMA Addendum at 8.

28 ³⁸ See *id.* at p. 5.

³⁹ See December 9, 2005, e-mail from George Leyva to Mary Rose Cassa, attached hereto as Exhibit O.

1 party which concealed an unlawfully abandoned UST. The considerable investigations to date
2 have narrowed the areas of concern on Mayhew's site to the fenceline abutting Walnut Creek
3 Manor properties. Given the groundwater flow in that area, it is likely that the PCE came from
4 Walnut Creek Manor's 40 years of maintenance and unlawfully abandoned UST, and not from
5 the small, downgradient EtchTek operation which has declared under oath that it did not use PCE.
6

7 Walnut Creek Manor's consultants recognized that the logical path of investigation of
8 included deep borings on Mayhew's property, in order to evaluate impacts from Walnut Creek
9 Manor's maintenance areas. After that work was completed, Walnut Creek Manor's consultant
10 recommended further borings beneath the maintenance and storage sheds, work that has still not
11 been completed. The Regional Board permitted Walnut Creek Manor to conduct additional
12 shallow soil work with the *proviso* that it would have to do the deeper borings if it found PCE in
13 the shallow soil samples. Walnut Creek Manor found PCE in the shallow soil samples, but has
14 never followed up with the deeper borings. It is only logical to require Walnut Creek Manor to
15 complete this follow-up work upgradient before requiring Mayhew to assess the possible
16 downgradient impacts.
17

18 As a small property owner unrelated to any PCE use or discharge, Mayhew should not be
19 forced to use its scarce resources to pour over the vast sea of data in Hookston Station's reports.
20 The Hookston station documents should be well-known to the staff member handling the
21 Mayhew and Walnut Creek Manor sites—she also handles the Hookston Station site. Mayhew
22 should not have to constantly point out what the Regional Board is supposed to know. Regional
23 Board staff have never commented on a single report produced in the area, and its failure to
24 respond to and use data foreshadows only further baseless, unproductive demands for Mayhew.
25
26
27
28

1 2. Mayhew is the Victim of a Serious Abuse of Process and Policy

2 Mayhew asks the State Board, as it has repeatedly asked the Regional Board managers, to
3 review the repeated abuses of process in this matter. For 18 months, the Regional Board
4 stonewalled Mayhew's efforts to address the true state of affairs in the area and the staff's
5 mishandling of this matter. Worse, Mayhew's voluntary submissions were met with disdain and
6 retaliation. Staff threatened penalty enforcement action and alleged non-compliance with Orders
7 that had been rescinded.⁴⁰ Staff have made repeated false assertions, either out of ignorance or
8 malice, then later silently dropped them without acknowledging their falsehood. This leaves a
9 document trail that can be used to slander Mayhew's property and its owner. Even when
10 Mayhew's hard work finally resulted in the Regional Board ordering the necessary work at
11 upgradient Walnut Creek Manor, the Regional Board refused to require a logical, phased
12 investigation, apparently punishing Mayhew for pressing the Regional Board to pursue a rational
13 approach.
14

15 It is challenging in the confines of a Petition for Review to convey the overwhelming
16 sense that pervades this matter; *i.e.* that the Regional Board seems determined to provide no way
17 out for Mayhew regardless of science now available or produced in the future. In addition to the
18 above, other examples include
19

- 20 a. the Regional Board's indications that shallow soil findings are irrelevant to
21 whether a source is present; and
22 b. that fictional underground piping must be assumed to exist until affirmatively
23 disproved as an impossibility; and
24 c. that site histories submitted under penalty of perjury must be disregarded because
25 detailed recollections are inherently worthless due to the passage of time.

26 These positions do not reflect a fair-minded, rational process grounded in science and policy, but

27 ⁴⁰ An Order of July 29, 2005, which was never supported or justified, was deemed satisfied or withdrawn in a
28 meeting in August. Suddenly, the Order was "revived" in a Notice of Violation of September 27, 2005. Mayhew's
efforts to seek review of the Notice of Violation (obviously itself issued after expiration of the appeal period for the
July 29, 2005, order) were deemed untimely by the State Board's Office of Chief Counsel. Mayhew's efforts to
address the merits of the matter with Regional Board management have been continually rebuffed.

1 rather an unorganized, arbitrary, or even ill-motivated investigation.

2 In the latest inexplicable event, Mayhew recently learned that the Regional Board has
3 surreptitiously requested a site history for Mayhew's property from a prior owner.⁴¹ There is
4 nothing nefarious about such a request, but the Regional Board made it without copying Mayhew
5 or its counsel. A former's owner's recollection of operations on Mayhew's property is highly
6 relevant to the justification for and appropriate focus of the site investigation workplan the
7 Regional Board has ordered. Further, any report filed in response has not been shared with
8 Mayhew. And this is not the first time the Regional Board has withheld important information
9 from Mayhew. In 2005, the Regional Board staff requested a site request from EtchTek, the
10 supposed source of PCE at the property.⁴² Aside from the physical presence of PCE on the
11 property, EtchTek's prior occupancy was the only basis for targeting Mayhew. The detailed
12 response thoroughly refuted any speculation that EtchTek had used PCE, yet the Regional Board
13 withheld the document from Mayhew until Mayhew stumbled upon it and demanded access.⁴³
14
15

16 Each of the examples set forth might be innocently explained if they were isolated blips in
17 an otherwise standard investigation. But viewed cumulatively, they point to only one conclusion:
18 Regional Board staff were determined to issue cleanup and abatement orders to Mayhew
19 regardless of data. The staff confirmed as much in a meeting with Mayhew in which they
20 explained that they would rather let the parties "fight it out." But the Regional Board bears the
21 burden of providing reasonable evidence showing that the target of a 13267 Order is a discharger.
22 Board staff may neither selectively review data, nor may they retaliate against parties who stand
23 up for themselves. Board staff also lack statutory and regulatory authority to order any impacted
24 property owner to engage in the burdensome work of figuring out who the discharger is because
25

26 ⁴¹ See Requirement for Technical Report on Site History (October 5, 2006), attached hereto as Exhibit J.

27 ⁴² See Request for Technical Report on Site History (September 7, 2005), attached hereto as Exhibit K.

28 ⁴³ See April 19, 2004, e-mail from Mary Rose Cassa to Katharine Wagner, attached as Exhibit N.

1 the staff is not inclined to do its job. The Regional Board's continued abuses, whether through
2 bumbling or malice, must not be allowed to continue.

3
4 **C. The Regional Board's Order Fails to Comply with the Cost/Benefit Provisions**
5 **of Section 13267 and Resolution 92-49**

6 Water Code section 13267(b)(1) authorizes a regional board to investigate the quality of
7 waters in its region by requiring dischargers to conduct investigations, but requires the regional
8 board to ensure that the "burden, including costs, of these reports shall bear a reasonable
9 relationship to the need for the reports and the benefits to be obtained from the reports."⁴⁴
10 Resolution 92-49⁴⁵ fills out this cost/benefit analysis requirement, explaining that the Regional
11 Board *shall* "[c]onsider whether the burden, including the costs, of reports required of the
12 discharger . . . bears a reasonable relationship to the need for the reports and the benefits to be
13 obtained from the reports."⁴⁶ The Regional Board's December 14, 2006, Order to Mayhew fails
14 to comply with both the substance and procedure of section 13267 and Resolution 92-49.

15 First, the Order contains an unsupported estimate of costs to write the plan and fails to
16 consider the cost of *executing* the plan. Second, the Regional Board failed to consider the
17 economic impact upon Mayhew, or to explain its balance of costs and benefits. The Order
18 contains nothing more than a conclusory statement that the "cost is reasonable in light of the need
19 to understand the nature and extent of the area contaminated in order to determine what degree of
20 remediation is necessary to protect water quality and public health."⁴⁷ But such a conclusory,
21 boiler-plate statement cannot alone satisfy the requirements of the statute and the resolution. A
22 Google search revealed, in .27 seconds, that this generic language is simply copied, almost word
23

24
25 ⁴⁴ Cal. Water Code § 13267(b)(1); accord City of Arcadia v. State Water Resources Control Bd., (2006) 135
Cal.App.4th 1392, 1413 [38 Cal.Rptr.3d 373].

26 ⁴⁵ See State Water Resources Control Board, Resolution 92-49, *available at* <http://www.swrcb.ca.gov/plnspols/docs/wqplans/res92-49> (last visited January 9, 2007).

27 ⁴⁶ Id. at ¶ III.B.

28 ⁴⁷ See Mayhew Order at p. 5.

1 for word, out of an SWRCB Order.⁴⁸

2 There is nothing wrong with the phrasing of this conclusion, of course, but what is
3 missing is any site-specific analysis or supporting rationale. In particular, Mayhew wants to
4 understand why it is reasonable for it to pay tens of thousands of dollars to conduct an
5 investigation on its property without first understanding the PCE distribution at the upgradient
6 property which is the likely source of the PCE on Mayhew's property. Resolution 92-49 requires
7 dischargers to "include the supporting rationale for the selected methods,"⁴⁹ and the Regional
8 Board must do the same. Section 13267 provides that "the regional board *shall* provide the
9 person with a written explanation with regard to the need for the reports, and *shall* identify the
10 evidence that supports requiring that person to provide the reports."⁵⁰ But the Regional Board
11 completely fails to provide a written explanation workplan and investigation are cost-effective or
12 what evidence supports its decision. Instead, the Regional Board makes only a conclusory
13 statement copied out of an SWRCB Order.

14 Third—and perhaps not surprisingly given the Regional Board's failure to engage in a
15 meaningful evaluation of costs and benefits—the investigation proposed by the Regional Board is
16 not cost-effective. Resolution 92-49 indicates that one of the key methods for a cost-effective
17 investigation is the ability to "focus investigative activities on locations and wastes or materials
18 handled at the site."⁵¹ In Mayhew's case, the only way to focus on the locations where the waste
19 may be is to characterize the upgradient source *first*. As explained in section A above, there is
20 nothing but bare speculation that EtchTek's circuit board operations *could* have used PCE at the
21 site in the 1970s. But that speculation has been conclusively refuted by the circuit board
22 manufacturers.⁵² On the other hand, there strong evidence indicating that the upgradient Walnut
23

24 ⁴⁸ See SWRCB Order No. WQO 2004-0003 at p. 11. The results of the Google search may be examined at
25 <http://www.google.com/search?hl=en&lr=&q=water+%22reasonable+in+light+of+the+need%22> (last visited
January 9, 2007).

26 ⁴⁹ See Resolution 92-49 at ¶ III.C.

27 ⁵⁰ Cal. Water Code § 13267(b)(1) (emphasis added).

28 ⁵¹ Resolution 92-49 at ¶ III.D.1.a.

⁵² See Beard Declaration, attached hereto as Exhibit C, at pp. 1-2.

1 Creek Manor campus's maintenance operation near the border of the Mayhew site is the source of
2 PCE. It seems extraordinarily likely that the PCE on Mayhew's property migrated from the PCE
3 source on Walnut Creek Manor's property. The only way to "focus on the location[]" of PCE on
4 Mayhew's site is to understand the path of migration from the upgradient Walnut Creek Manor
5 campus.

6 Further, Resolution 92-49 suggests that a "progressive" or phased investigation is not only
7 appropriate, but the default.⁵³ In fact, paragraph II.A.2 of the Resolution indicates that deviation
8 from the progressive approach is only appropriate in case of emergency, imminent threat of
9 pollution, delayed investigations, or very small discharges.⁵⁴ A reasonable, cost-effective, phased
10 investigation at this point would first look to the probable source of PCE at the Walnut Creek
11 Manor campus' maintenance facility and then work its way downgradient. The pollution levels
12 will likely act like a roadmap, indicating where to look next. Knowing the path and the point at
13 which the PCE transitions from the Walnut Creek Manor campus to the Mayhew site will show
14 consultants where to look for PCE on the Mayhew property.

15 Such a phased approach is more likely to reduce costs for all parties involved, lead to a
16 better understanding of the extent of the PCE contamination, and reduce the overall
17 environmental impact. The SWRCB's own policies are in accord. Resolution 92-49 declares that
18 "[o]verall costs have increased" when cleanup activities "have had no positive effect," and that
19 such inefficient action has even "exacerbated the pollution."⁵⁵ Phased investigations "facilitate
20 adequate delineation of the nature and extent of the pollution, and may reduce overall costs and
21 environmental damage."⁵⁶ This Board has also recognized that "investigations inherently build
22 on information previously gained,"⁵⁷ the thrust of Mayhew's argument. A logical investigation at
23 the upgradient source is likely to tell regulators where to look for PCE on its property and is
24 likely to lead to a more efficient, faster cleanup.

25 ⁵³ Resolution 92-49 at ¶ II.A.1.

26 ⁵⁴ See *id.* at ¶¶ II.A.2(a)-(d).

27 ⁵⁵ *Id.* at ¶ 14.

28 ⁵⁶ *Id.* at ¶ 15.

⁵⁷ *Id.*

1 Finally, this Board has recognized that "improperly planned investigations" often result in
2 "greater costs or increased environmental damage."⁵⁸ The Regional Board's haphazard,
3 spasmodic activities in this case have resulted in improper planning, and threaten to impose
4 greater costs on Mayhew and to delay site cleanup, leaving the PCE at elevated levels in both soil
5 and groundwater. The Regional Board's inexplicable actions in this case violate both Resolution
6 92-49 and Water Code section 13267's command to facilitate cost-effective, phased
7 investigations, and must be vacated.

8 **D. The Regional Board's Decision Is Internally Inconsistent and Must Be**
9 **Reversed**

10 Aside from the substantive flaws in the Regional Board's December 14, 2006, order, the
11 SWRCB should reverse it because it is internally inconsistent. An upgradient property owner
12 who admits activities highly likely to have involved particular pollutants should characterize its
13 pollution before forcing the downgradient owner to characterize the damage to its property,
14 particularly when all the evidence suggests that the downgradient property owner is the victim,
15 not the source. In its February 11, 2005, letter to Mayhew, the Regional Board recognized as
16 much and definitively stated that it would "suspend the due date for a work plan until a site
17 investigation is completed at the up-gradient property, Walnut Creek Manor."⁵⁹ Board staff
18 confirmed this directive at an August 2, 2005, meeting. The letter, in conjunction with the in-
19 person confirmation, strongly suggests that its decision to investigate the Walnut Creek Manor
20 campus first was deliberative and definitive.

21 When the Regional Board staffer assigned to the site handed the project off to a new staff
22 member, he explained that "it might not be reasonable" to assume that Mayhew was a source and
23 that requiring an investigation at Mayhew's site might be premature.⁶⁰ Suddenly, and without
24 explanation, the Regional Board reversed course and ordered Mayhew to conduct an investigation
25 on its property. Ordering the downgradient property owner to investigate its property while

26 ⁵⁸ Id.

27 ⁵⁹ See Letter of February 11, 2005, attached hereto as Exhibit L.

28 ⁶⁰ See Case Transfer, Hookston Station, attached hereto as Exhibit N, at p. 2.

1 permitting the upgradient owner to sit idly by would be highly suspect had the Regional Board
2 come to the decision initially. But reversing course and choosing a highly questionable
3 investigation method after making what appears to be the common-sense choice reeks of
4 invalidity and capriciousness.

5 Administrative agencies often have a fair amount of discretion to determine the best
6 course of action in any particular case, but they may not act in a manner that is an abuse of
7 discretion or "arbitrary and capricious."⁶¹ The SWRCB, of course, owes no deference to the
8 Regional Board's findings,⁶² but the statutes are still instructive. Here, the Regional Board's
9 decision is "arbitrary and capricious" because, among other things, the Regional Board has
10 switched horse's mid-stream—from the logical to the illogical—without explanation and without
11 express acknowledgement that it was doing so. The Regional Board is by no means bound
12 forever to the decisions it makes at one point in an investigation, it must at least give a reasoned
13 explanation for such a change. When an agency has definitively stated its position on a particular
14 action, it is not free to change its mind at a whim.

15 Several important courts have held that agency actions is "arbitrary and capricious" when
16 it is internally inconsistent or when the agency changes its position without explanation. The
17 D.C. Circuit, for example, has repeatedly struck down agency action that is "internally
18 inconsistent and without adequate explanation."⁶³ The Ninth Circuit recently held that an agency
19 decision that is internally inconsistent renders "the ultimate decision [] not the result of reasoned
20 decision-making" and thus arbitrary and capricious.⁶⁴ Further, the California Courts have
21 recognized that

22
23 ⁶¹ See Cal. Code Civ. Proc. 1094.5(b); see also Joint Council of Interns & Residents v. Board of Supervisors (1989)
210 Cal.App.3d 1202, 1209, 258 Cal.Rptr. 762 (Cal.App. 1989).

24 ⁶² See Cal. Water Code § 13320(c).

25 ⁶³ Gen. Chem. Corp. v. United States, 817 F.2d 844, 857 (D.C.Cir. 1987); see also International Alliance of
26 Theatrical and Stage Employees v. N.L.R.B., 334 F.3d 27, 34 (D.C.Cir. 2003); Military Toxics Project v. E.P.A.,
146 F.3d 948, 956 (D.C.Cir. 1998) (recognizing "internally inconsistent" regulation would be invalid); Air Transport
Ass'n of America v. Department of Transp., 119 F.3d 38, 43 (D.C. Cir. 1997).

27 ⁶⁴ Defenders of Wildlife v. U.S. Environmental Protection Agency, 420 F.3d 946, 961 (9th Cir. 2005) (certiorari
28 granted on other grounds as stated in E.P.A. v. Defenders of Wildlife, --- S.Ct. ---, 2007 WL 30545 (January 5,
2007)).

1 "When legislation has been applied in judicial decisions and then a subsequent statute on
2 an analogous subject employs identical language, it is to be presumed that the Legislature
3 intended that the language be given a like interpretation in applying the new enactment. This rule
4 is applicable to state statutes which are patterned after federal statutes."⁶⁵

5 Section 1094.5 is very similar to the federal Administrative Procedure Act,⁶⁶ so the
6 SWRCB should view the above-cited federal decisions as persuasive authority.⁶⁷

7 The agency has abruptly shifted course in this matter but has never offered an explanation.
8 If there is new legal or technical information, the Regional Board should put it forward. Mayhew
9 Center has repeatedly reaffirmed that it is willing to do its part, but does not want to shoulder the
10 burden of the upgradient, likely source of PCE. If nothing else, Mayhew is owed an explanation
11 of *why* the Regional Board reversed its previous, written opinion that the PCE on the upgradient
12 Walnut Creek Manor campus should be characterized first.

13 **5. THE MANNER IN WHICH PETITIONER IS AGGRIEVED:**

14 Mayhew is a small business, nearly one-tenth the size of the Walnut Creek Manor's
15 upgradient, sprawling campus. Because the Regional Board has improperly characterized
16 Mayhew as a discharger, inappropriately ordered Mayhew to investigate the property, and
17 irrationally reversed its written opinion without so much as an explanation, Mayhew has been
18 forced to spend tens of thousands of dollars on attorneys and consultants. By the Regional
19 Board's own estimate, the pending investigatory work plan will cost approximately \$10,000.
20 This does not address the costs of carrying out the planned work and the Regional admits that this
21 will likely be the first of many work plans.⁶⁸ Mayhew should not be pushed into financial peril
22 based on irrational, unlawful, and arbitrary action by the Regional Board.

25 ⁶⁵ Nishikawa Farms, Inc. v. Mahony, 66 Cal.App.3d 781, 136 Cal.Rptr. 233 (1977).

26 ⁶⁶ 5 U.S.C. § 701 *et seq.*

27 ⁶⁷ See Kings Rehabilitation Center, Inc. v. Premo, 69 Cal.App.4th 215, 219, 81 Cal.Rptr.2d 406 (Cal.App. 1999)
(noting federal act as "analog" to California Act).

28 ⁶⁸ See Walnut Creek Manor Order at 5.

1 **6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH**
2 **THE PETITIONER REQUESTS:**

3 Mayhew requests that the SWRCB vacate the December 14, 2006, Order of the San
4 Francisco Bay Regional Board as unlawful, inappropriate, and unreasonable. Further, Mayhew
5 requests that the SWRCB order that Mayhew is not required to investigate the PCE on its
6 property until the characterization at the Walnut Creek Manor campus is complete, unless there is
7 substantial new information suggesting that an investigation at Mayhew is warranted. Finally,
8 Mayhew requests that the SWRCB order that any change in position by the Regional Board be
9 supported by new information and a full explanation of the Regional Board's reasoning.

10 **7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL**
11 **ISSUES RAISED IN THE PETITION:**

12 Mayhew's preliminary statement of points and authorities is set forth in Section 4 above.
13 Mayhew reserves the right to supplement this statement upon receipt and review of the
14 administrative record and hearing transcript.

15 **8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL**
16 **BOARD AND TO THE DISCHARGER:**

17 A true and correct copy of this Petition was mailed by First Class mail on January 16,
18 2007, to the San Francisco Bay Regional Water Quality Control Board at the following address:

19 Bruce H. Wolfe, Executive Officer
20 California Regional Water Quality Control Board,
21 San Francisco Bay Region
1515 Clay Street, Ste. 1400
Oakland, California 94612

22 The Petitioner is the alleged discharger; therefore, a copy was not separately mailed to the
23 discharger.

1 9. A STATEMENT OF THE SUBSTANTIVE ISSUES AND OBJECTIONS RAISED
2 IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD, OR
3 WERE NOT REQUIRED OR WERE UNABLE TO BE RAISED:

4 Mayhew raised the substantive issues and objections before the Regional Board. This was
5 done during the one-week period the Regional Board provided for written comments to the draft
6 order, letters exchanged prior to the draft order, and other written and verbal communication with
7 Regional Board staff.

8 10. PETITIONER'S REQUEST FOR EVIDENTIARY HEARING:

9 For the reasons set forth above, Mayhew requests that the State Board conduct a full
10 evidentiary hearing to consider this Petition in accordance with Title 23, California Code of
11 Regulations, section 2052(c).

12 Respectfully Submitted,

13
14 DATED: January 16, 2007

DOWNEY BRAND LLP

15
16
17 By: 

KATHARINE E. WAGNER
Attorney for Petitioner
MAYHEW CENTER, LLC

18
19
20 823982.3
21
22
23
24
25
26
27
28



Linda S. Adams
Secretary for
Environmental
Protection

California Regional Water Quality Control Board San Francisco Bay Region

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>



Arnold Schwarzenegger
Governor

DEC 14 2006

Date:

File No: 07S0183 (MRC)

Mayhew Center, LLC
Attn: Dean Dunivan
rddunivan@yahoo.com
3317 Vincent Road
Pleasant Hill, CA 94523

SUBJECT: Property at 3301-3341 Vincent Road, Pleasant Hill, Contra-Costa County - Order
Requiring Report on Soil and Groundwater Characterization Pursuant to Water
Code Section 13267

Dear Mr. Dunivan:

This Order requires that Mayhew Center, LLC (hereafter "you") submit a report on soil and groundwater characterization for your property, known as Mayhew Center and located at 3301-3341 Vincent Road in Pleasant Hill, California. This Order supersedes and replaces all previous pending directives pursuant to Water Code Section 13267 for the subject property. Data you have submitted in response to previous directives was obtained without a workplan approved by this Board and without oversight of a qualified geologist or engineer. However, that data has been considered in preparing this order and shall be considered as part of the response to this order. As explained below, the required information will help Board staff to evaluate the nature and extent of soil and groundwater contamination beneath your property, which can then be used to design remedial activities if appropriate.

Background

Investigations regarding the contamination of soil and groundwater at the Hookston Station site, located at 228 Hookston Road, have been conducted since 1989. These investigations discovered the presence of chlorinated solvents (which are commonly used as degreasers) in the soil and groundwater at the site. Because of their chemical characteristics, when chlorinated solvents are released into the environment via, e.g., spills on the ground or leaks from underground tanks or piping, they migrate downward, eventually encountering groundwater. The solvents dissolve into groundwater and then are carried along with the flow of the groundwater. Solvents can also be washed across the ground surface before migrating downward. This can sometimes lead to offsite contamination of shallow soil and groundwater.

Most solvents are relatively dense (specific gravity greater than 1.0) and tend to migrate downward through the soil column over time. If a release of solvents occurred several years ago, it is likely that the solvents have migrated downward and may be present at higher concentrations at greater depth. Further, most solvents have a tendency to evaporate readily (vapor pressure substantially less than that of water at 760 mm), and concentrations detected in shallow soil are not expected to be indicative of the absence of a historic release.

Depending on the length of time that has elapsed since a solvent release occurred, it is possible for the released solvent to have migrated through the unsaturated soil column and to have accumulated below the ground water in a zone underlain by fine-grained deposits. Therefore, groundwater sampling is a necessary component of any solvent source area investigation to conclusively determine the absence or presence of a solvent source.

In October-November 2001, a passive soil vapor survey was conducted for the Hookston Station remedial investigation as a screening tool to identify the approximate limits of soil and ground water impacted with Hookston-related chlorinated solvents. During that investigation, elevated concentrations of the chlorinated solvent tetrachloroethene (PCE) and associated breakdown products were found in soil vapor samples collected along Vincent Road, near your property at 3301-3341 Vincent Road. Subsequent investigation and monitoring activities identified concentrations of PCE in groundwater as high as 7,200 micrograms per liter ($\mu\text{g/L}$) in monitoring wells installed in Vincent Road. PCE has not been identified as a solvent that was used at the Hookston Station site. Ground water monitoring data indicate that the chemical impacts from PCE may originate from an off-site (i.e., non-Hookston) source area that appears to be located west (upgradient) of Hookston Station. Based on groundwater monitoring data for the Hookston Station site (e.g., *Third Quarter 2006 Monitoring Report*; ERM, October 31, 2006), it appears that an upgradient source may have merged with the Hookston Station groundwater impacts, and the mixed ground water plume has migrated further downgradient beneath a residential neighborhood.

Shallow groundwater sampling was conducted on your property (Heilshorn Environmental Engineering; May 20, 2005) to evaluate soil and groundwater conditions in the vicinity of historic storage and maintenance activities by your neighbor, Walnut Creek Manor, along the boundary with your property. Groundwater was encountered in a borehole on your property at about 12 feet below ground surface. That sample indicated the presence of PCE in groundwater up to 1,200 micrograms per liter ($\mu\text{g/l}$), which exceeds the drinking water standard of 5 $\mu\text{g/l}$ and exceeds the California Regional Water Quality Control Board, San Francisco Bay Region, Environmental Screening Level (ESL) of 120 $\mu\text{g/l}$ for groundwater that is not a source of drinking water.

Preliminary shallow soil sampling on your property (July 26, 2005) was carried out without a workplan approved by this Board and without oversight of a qualified geologist or engineer. Nevertheless, data from that preliminary shallow soil sampling indicates the presence of PCE in unsaturated soil up to 11 milligrams per kilogram (mg/kg) at a depth of six feet below ground surface on your property. This concentration exceeds the ESL of 0.24 mg/kg for commercial land use and to prevent leaching to groundwater.

Your property is a suspected source of PCE because it has been detected in soil and groundwater beneath your property. A tenant on the property before you owned it manufactured printed wiring boards, a process that normally involves the use of various solvents. Documentation exists that indicates solvents were used in the tenant's manufacturing operations. This former tenant has stated that PCE was not used in the manufacturing operations at the site; however, the statement is based on recollection of operations that took place about 25 years ago. Additionally, documentation exists that indicates the presence of a structure on your property during the time in which the former manufacturing operations were active. The structure appears to be located near the apparent source area for the PCE. The former tenant has also stated that the structure was not involved in the manufacturing operations (again, based on recollections from 25 years ago). You have also indicated that the structure was not involved in the operations by stating that there are no plumbing lines from the building to the location of the former structure. However, piping could have been removed at any time while the former manufacturer was located at the property or after the manufacturer vacated the property in the early 1980s until you acquired the property in the early 1990s. Further, the structure could have been used for activities not directly involved in the manufacturing process.

Results of soil investigations near the boundary between your property and Walnut Creek Manor indicate that the highest concentrations of PCE in soil are found beneath your property. Your property is about three feet higher in elevation than where the historic storage and maintenance activities occurred at Walnut Creek Manor. The elevated soil concentrations in soil beneath your property are at least one foot higher in elevation and at least twice the magnitude as concentrations in soil at Walnut Creek Manor. It is unlikely that elevated soil concentrations beneath your property in the unsaturated zone above the water table are related entirely to volatilization of dissolved solvents in groundwater that you have asserted must be coming from Walnut Creek Manor. It is also unlikely that a two-fold increase in soil concentration between Walnut Creek Manor and your property could be attributed entirely to migration or volatilization within the soil. We therefore infer that contamination may have migrated from a place or places at or near the ground surface that have not been previously sampled. To define the horizontal and vertical distribution of PCE in the subsurface, we require chemical analysis of soil samples from the ground surface through the unsaturated zone, to the first occurrence of groundwater. We also require measurement of depth to groundwater and systematic sampling and analysis of groundwater that occurs in one or more discrete hydrostratigraphic units beneath areas where soil is impacted, as well as laterally to characterize the extent of the groundwater plume.

Contamination Impacts

The contamination on your property threatens to adversely affect the beneficial uses of groundwater, which include municipal and domestic supply, industrial process and service water supply, and agricultural supply. In addition, this contamination threatens to adversely affect Walnut Creek, the surface water body closest to your property. This contamination threatens to cause a condition of pollution in waters of the State, and should be fully delineated and abated in the shortest reasonable period of time. Further, it is possible that PCE on your site is contributing to downgradient contamination beneath a residential neighborhood.

Requirement to Submit a Workplan

This Order is directed to you as the owner of property where contamination at which the Water Board suspects a discharge of waste is occurring or may have occurred that could affect the quality of waters of the state. It is necessary to sample soil and groundwater beneath your property to determine the horizontal and vertical distribution of PCE in the subsurface. This information will assist in identifying a source area near the property boundary and may also be used to determine the responsible party for the release to the environment. The information may also provide a basis for decisions regarding subsequent cleanup and abatement action.

You are required to submit a report containing the following information by January 26, 2007:

A workplan designed to characterize the soil and groundwater on and beneath your property and help develop a better conceptual understanding of the pollution. In general the workplan shall propose to obtain data to define source areas of contamination, the vertical and lateral extent of contamination, the potential pathways of migration, and the potential receptors that might be at risk from the contamination. The data will be used to determine whether, and to what extent, a threat to human health or the environment exists and to develop and evaluate remedial alternatives (including the no-action alternative). The workplan shall include the following elements:

- Analysis and summary of the site background and physical setting
- Presentation of the conceptual site model, including an analysis and summary of the nature and extent of contamination and the additional data needed to complete the site characterization and evaluation of remedial alternative (if needed).
- Sampling program based on known information such as locations of utilities and structures, historic activities, and existing analytical data. The sampling program shall be designed to document concentration gradients in soil and groundwater and identify source areas, and shall include soil borings as close as practicable to the retaining wall at the base of the slope on the west boundary of your property.
- Sampling objectives, with sample location, frequency, and designation. The objective of the soil and groundwater sampling is to gain an understanding of the three-dimensional extent and concentrations of PCE (and its environmental breakdown products) in the subsurface, and an understanding of the geologic and hydrologic factors that control the migration of PCE. The workplan shall depict proposed locations on a scaled map and include provisions for surveying sample locations by a licensed professional land surveyor.
- Sampling equipment and procedures. Appropriate site characterization shall include soil samples from the surface to groundwater and grab-groundwater samples at multiple depths. Soil boring logs shall include location and designation and specific information including depth of borehole, percent recovery, sample depths, depth to groundwater, and geologic observations such as color and texture (Unified Soil Classification System), moisture content, odor, and presence of suspected contaminants. The workplan shall clearly state how soil samples will be selected and what length of soil core will be cut, sealed, and preserved for analysis. It is common practice to select portions of the continuous soil core for analysis that show the greatest field evidence for chemical impact (i.e., have an odor or unusual staining, or have elevated photoionization detector (PID)

readings). It is also common practice to collect groundwater samples from zones with sufficient groundwater flow from each hydrostratigraphic interval. Exact sample depths shall be determined in the field, based on observation.

- Sample handling and analysis
- Quality assurance objectives and procedures
- Project Schedule with corresponding time to complete individual tasks

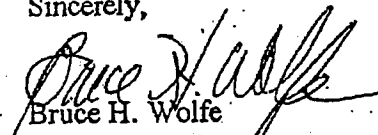
The foregoing workplan is needed to address the ongoing water quality threat posed by PCE in shallow groundwater. The workplan required by this Order will help Board staff define the horizontal and vertical distribution of PCE in the subsurface and evaluate remedial measures, if appropriate. To date, the source area for the release appears to straddle the boundary between your property and Walnut Creek Manor. This information will assist in identifying a source area and may also be used to determine the responsible party for the release to the environment. More detailed information is available in the Regional Water Board's public file on this matter.

Based on Board experience with hundreds of groundwater investigation sites, I expect this workplan to cost less than \$10,000. This cost is reasonable in light of the need to understand the nature and extent of the area contaminated in order to determine what degree of remediation is necessary to protect water quality and public health. The Workplan may propose a phased investigation, such as including a soil-vapor investigation to identify hot-spots for follow-up sampling, and may be prepared by a third party. Because the site characterization process is dynamic and iterative, additional workplans may be needed in the future to incorporate new information and refined objectives for the site. Please consult the Geotracker website (<http://geotracker.waterboards.ca.gov>) for information regarding electronic data submittal. The Global ID Number is SL0601341185. Please submit a paper copy report for staff review and reference file number 07S0183 on all correspondence and reports.

This Order requiring submittal of a report is made pursuant to Water Code Section 13267, which allows the Board to require technical or monitoring program reports from any person who has discharged, discharges, proposes to discharge, or is suspected of discharging waste that could affect water quality. The enclosure provides additional information about Section 13267 requirements. Any extension in the above deadline must be confirmed in writing by Board staff.

If you have any questions, please contact Mary Rose Cassa of my staff at (510) 622-2447 [e-mail mcassa@waterboards.ca.gov].

Sincerely,


Bruce H. Wolfe
Executive Officer

Enclosure: California Water Code Section 13267 Fact Sheet



Linda S. Adams
Secretary for
Environmental
Protection

California Regional Water Quality Control Board

San Francisco Bay Region

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>



Arnold Schwarzenegger
Governor

Fact Sheet – Requirements for Submitting Technical Reports Under Section 13267 of the California Water Code

What does it mean when the regional water board requires a technical report? Section 13267¹ of the California Water Code provides that "...the regional board may require that any person who has discharged, discharges, or who is suspected of having discharged or discharging, or who proposes to discharge waste...that could affect the quality of waters...shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

This requirement for a technical report seems to mean that I am guilty of something, or at least responsible for cleaning something up. What if that is not so? The requirement for a technical report is a tool the regional water board uses to investigate water quality issues or problems. The information provided can be used by the regional water board to clarify whether a given party has responsibility.

Are there limits to what the regional water board can ask for?

Yes. The information required must relate to an actual or suspected or proposed discharge of waste (including discharges of waste where the initial discharge occurred many years ago), and the burden of compliance must bear a reasonable relationship to the need for the report and the benefits obtained. The regional water board is required to explain the reasons for its request.

What if I can provide the information, but not by the date specified?

A time extension may be given for good cause. Your request should be promptly submitted in writing, giving reasons.

Are there penalties if I don't comply?

Depending on the situation, the regional water board can impose a fine of up to \$5,000 per day, and a court can impose fines of up to \$25,000 per day as well as criminal penalties. A person who submits false information or fails to comply with a requirement to submit a technical report may be found guilty of a misdemeanor. For some reports, submission of false information may be a felony.

Do I have to use a consultant or attorney to comply?

There is no legal requirement for this, but as a practical matter, in most cases the specialized nature of the information required makes use of a consultant and/or attorney advisable.

What if I disagree with the 13267

requirements and the regional water board staff will not change the requirement and/or date to comply?

You may ask that the regional water board reconsider the requirement, and/or submit a petition to the State Water Resources Control Board. See California Water Code sections 13320 and 13321 for details. A request for reconsideration to the regional water board does not affect the 30-day deadline within which to file a petition to the State Water Resources Control Board

If I have more questions, whom do I ask?

Requirements for technical reports indicate the name, telephone number, and email address of the regional water board staff contact.

¹ All code sections referenced herein can be found by going to www.leginfo.ca.gov.

B



California Regional Water Quality Control Board

San Francisco Bay Region



Linda S. Adams
Secretary for
Environmental
Protection

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>

Arnold Schwarzenegger
Governor

Date: DEC 14 2006
File No: 07S0183 (MRC)

Walnut Creek Manor, LLC
Attn: Ms. Marilyn Boswell
1686 Union Street Suite #306
San Francisco, CA 94123

Walnut Creek Manor, LLC
Attn: Mr. Milt Eberle
Wgidinc@aol.com
5709 Marconi Avenue, Suite D
Carmichael, CA 95608

SUBJECT: Property at 81 Mayhew Way, Walnut Creek, Contra Costa County – Order
Requiring Report on Soil and Groundwater Characterization and Site History
Pursuant to Water Code Section 13267

Dear Ms. Boswell and Mr. Eberle:

This Order requires that Walnut Creek Manor, LLC (hereafter referred to as "you") submit a report on soil and groundwater characterization and site history for your property, known as Walnut Creek Manor and located at 81 Mayhew Way in Walnut Creek, California. As explained below, this information will help Board staff to determine the nature and extent of soil and groundwater contamination beneath your property, which can then be used to design remedial activities if appropriate.

Background

Investigations regarding the contamination of soil and groundwater at the Hookston Station site, located at 228 Hookston Road, have been conducted since 1989. These investigations discovered the presence of chlorinated solvents (which are commonly used as degreasers) in the soil and groundwater at the site. Because of their chemical characteristics, when chlorinated solvents are released into the environment via, e.g., spills on the ground or leaks from underground tanks or piping, they migrate downward, eventually encountering groundwater. The solvents dissolve into groundwater and then are carried along with the flow of the groundwater. Solvents can also be washed across the ground surface before migrating downward. This can sometimes lead to offsite contamination of shallow soil and groundwater.

Most solvents are relatively dense (specific gravity greater than 1.0) and tend to migrate downward through the soil column over time. If a release of solvents occurred several years ago, it is likely that the solvents have migrated downward and may be present at higher concentrations at greater depth. Further, most solvents have a tendency to evaporate readily (vapor pressure substantially less than that of water at 760 mm), and concentrations detected in shallow soil are not expected to be indicative of the absence of a historic release.

Depending on the length of time that has elapsed since a solvent release occurred, it is possible for the released solvent to have migrated through the unsaturated soil column and to have accumulated below the ground water in a zone underlain by fine-grained deposits. Therefore, groundwater sampling is a necessary component of any solvent source area investigation to conclusively determine the absence or presence of a solvent source.

In October-November 2001, a passive soil vapor survey was conducted for the Hookston Station remedial investigation as a screening tool to identify the approximate limits of soil and ground water impacted with Hookston-related chlorinated solvents. During that investigation, elevated concentrations of the chlorinated solvent tetrachloroethene (PCE) and associated breakdown products were found in soil vapor samples collected along Vincent Road, near your property at 81 Mayhew Way. Subsequent investigation and monitoring activities identified concentrations of PCE in groundwater as high as 7,200 micrograms per liter ($\mu\text{g/L}$) in monitoring wells installed in Vincent Road. PCE has not been identified as a solvent that was used at the Hookston Station site. Ground water monitoring data indicate that the chemical impacts from PCE may originate from an off-site (i.e., non-Hookston) source area that appears to be located west (upgradient) of Hookston Station. Based on groundwater monitoring data for the Hookston Station site (e.g., *Third Quarter 2006 Monitoring Report*; ERM, October 31, 2006), it appears that an upgradient source may have merged with the Hookston Station groundwater impacts, and the mixed ground water plume has migrated further downgradient beneath a residential neighborhood.

Subsurface investigation on the eastern portion and close to the eastern boundary of your property (Heilshorn Environmental Engineering; May 20, 2005, and December 16, 2005) indicates the presence of PCE in soil up to 4.2 milligrams per kilogram (mg/kg) at a depth of six feet below ground surface. This concentration exceeds the California Regional Water Quality Control Board, San Francisco Bay Region, Environmental Screening Level (ESL) of 0.24 mg/kg for commercial land use. Groundwater sampling on your property (Heilshorn Environmental Engineering; May 20, 2005) indicates shallow groundwater is encountered at about 8 to 14 feet below ground surface. The May 2005 sampling did not detect PCE above laboratory reporting limits in groundwater beneath your property; however no groundwater samples were obtained from locations directly beneath locations on your property where PCE was detected in soil. Groundwater was also sampled from a boring advanced on the adjacent downgradient property, in order to evaluate potential contamination from historic storage and maintenance activities on your property, close to the property boundary. The sampling was conducted on the downgradient property due to limited access beneath the existing structures (carports). That sample indicated the presence of PCE in groundwater up to 1,200 micrograms per liter ($\mu\text{g/l}$), which exceeds the drinking water standard of 5 $\mu\text{g/l}$ and exceeds the ESL of 120 $\mu\text{g/l}$ for groundwater that is not a source of drinking water.

Your property is a suspected source of PCE because it has been detected in soil beneath your property. Further, historic activities that occurred on your property in the area of interest included fuel and chemical storage, equipment maintenance, and fabrication of items for use on site.

Results of soil investigations near the boundary between your property and Mayhew Center are inconclusive as to the precise location of the PCE source. To define the horizontal and vertical distribution of PCE in the subsurface, we require chemical analysis of soil samples from the ground surface through the unsaturated zone, to the first occurrence of groundwater. We also require measurement of depth to groundwater and systematic sampling and analysis of groundwater that occurs in one or more discrete hydrostratigraphic units beneath areas where soil is impacted, as well as laterally to characterize the extent of the groundwater plume. It is necessary to use available technology (e.g., low-clearance drilling or direct-push equipment) to obtain groundwater samples beneath the area where PCE was detected in soil to fully describe the horizontal and vertical distribution of PCE in soil and groundwater. This information will assist in identifying a source area and may also be used to determine the responsible party for the release to the environment.

In addition to PCE impacts to soil and groundwater cited above, it came to light in 2005 that a 5,000-gallon underground diesel tank was present on the property from 1963 until 1998. It is possible that the tank or any portion of the tank system could have been used for disposal of wastes between the time the diesel-fueled chiller was removed in 1984 and the removal of the tank in 1998. This was not investigated by the two soil samples from each end of the tank excavation that were analyzed for gasoline-range volatile hydrocarbons, methyl tert-butyl ether, benzene, toluene, ethyl benzene, and xylenes at the time the tank was removed. Further, your previous submittals regarding site history (February 15, 2005; December 30, 2005; and January 20, 2006) rely largely on public documents, and do not cite historic corporate records and/or interviews with personnel who are knowledgeable about site operations prior to 1992.

Contamination Impacts

The contamination on your property threatens to adversely affect the beneficial uses of groundwater, which include municipal and domestic supply, industrial process and service water supply, and agricultural supply. In addition, this contamination threatens to adversely affect Walnut Creek, the surface water body closest to your property. This contamination threatens to cause a condition of pollution in waters of the State, and should be fully delineated and abated in the shortest reasonable period of time. Further, it is possible that PCE on your site is contributing to downgradient contamination beneath a residential neighborhood.

Requirement to Submit a Workplan and Additional Site History Information

This Order is directed to you as the owner of property at which the Water Board suspects a discharge of waste is occurring or may have occurred that could affect the quality of waters of the state. It is necessary to sample soil and groundwater beneath your property to determine the horizontal and vertical distribution of PCE in the subsurface. This information will assist in identifying a source area near the property boundary and may also be used to determine the

responsible party for the release to the environment. The information may also provide a basis for decisions regarding subsequent cleanup and abatement action.

You are required to submit a report containing the following information by January 26, 2007:

1. A workplan designed to characterize the soil and groundwater on and beneath your property in an area extending from the eastern property boundary to a line 200 feet west of the eastern property boundary, and between 200 and 500 feet north of Mayhew Way. This information shall be used to develop a better conceptual understanding of the nature and extent of the contamination and to supplement visual observation and two soil samples taken when the fuel oil tank was removed in 1998. The workplan shall propose to obtain data to define source areas of contamination, the vertical and lateral extent of contamination, the potential pathways of migration, and the potential receptors that might be at risk from the contamination. The data will be used to determine whether, and to what extent, a threat to human health or the environment exists and to develop and evaluate remedial alternatives (including the no-action alternative). The workplan shall include the following elements:
 - Analysis and summary of the site background and physical setting
 - Presentation of the conceptual site model, including an analysis and summary of the nature and extent of contamination and the additional data needed to complete the site characterization and evaluation of remedial alternative (if needed).
 - Sampling program based on known information such as locations of utilities and structures, historic activities, and existing analytical data. The sampling program shall be designed to document concentration gradients in soil and groundwater and identify source areas, and shall include deep borings to groundwater within five feet west of the eastern boundary retaining wall.
 - Sampling objectives, with sample location, frequency, and designation. The objective of the soil and groundwater sampling is to gain an understanding of the three-dimensional extent and concentrations of PCE (and its environmental breakdown products) in the subsurface, and an understanding of the geologic and hydrologic factors that control the migration of PCE. The workplan shall depict proposed locations on a scaled map and include provisions for surveying sample locations by a licensed professional land surveyor.
 - Sampling equipment and procedures. Appropriate site characterization shall include soil samples from the surface to groundwater and grab-groundwater samples at multiple depths. Soil boring logs shall include location and designation and specific information including depth of borehole, percent recovery, sample depths, depth to groundwater, and geologic observations such as color and texture (Unified Soil Classification System), moisture content, odor, and presence of suspected contaminants. The workplan shall clearly state how soil samples will be selected and what length of soil core will be cut, sealed, and preserved for analysis. It is common practice to select portions of the continuous soil core for analysis that show the greatest field evidence for chemical impact (i.e., have an odor or unusual staining, or have elevated photoionization detector (PID) readings). It is also common practice to collect groundwater samples from zones with sufficient

groundwater flow from each hydrostratigraphic interval. Exact sample depths shall be determined in the field, based on observation.

- Sample handling and analysis
- Quality assurance objectives and procedures
- Project Schedule with corresponding time to complete individual tasks

2. Additional site history information that is based on historic corporate records and knowledge of personnel with experience dating back to the early years of Walnut Creek Manor. This shall include information and knowledge related to (1) locations and past practices involving the use and storage of chemicals including, in particular, PCE; (2) locations and past practices involving the generation, management, and disposal of hazardous wastes; (3) use of an underground storage tank that was installed in 1963 and removed in 1998 (including maintenance and control of tank system components); and (4) modifications, replacements, and removals of storm drain lines, or other excavation other than minor pavement repairs, within the study area. Site history information shall also include knowledge of persons which include personnel with duties supervising maintenance activities; personnel with grounds, building, appliance repair, and vehicle maintenance responsibilities; and personnel with maintenance supply purchasing responsibilities.

The foregoing information is needed to address the ongoing water quality threat posed by PCE in shallow groundwater. The workplan and site history information required by this Order will help Board staff determine the horizontal and vertical distribution of PCE in the subsurface and evaluate remedial measures, if appropriate. To date, the source area for the release appears to straddle the boundary between your property and Mayhew Center. This information will assist in identifying a source area and may also be used to determine the responsible party for the release to the environment. More detailed information is available in the Regional Water Board's public file on this matter.

Based on Board experience with hundreds of groundwater investigation sites, I expect this workplan to cost less than \$10,000. This cost is reasonable in light of the need to understand the nature and extent of the area contaminated in order to determine what degree of remediation is necessary to protect water quality and public health. The Workplan may propose a phased investigation, such as including a soil-vapor investigation to identify hot-spots for follow-up sampling, and may be prepared by a third party. Because the site characterization process is dynamic and iterative, additional workplans may be needed in the future to incorporate new information and refined objectives for the site. Please consult the Geotracker website (<http://geotracker.waterboards.ca.gov>) for information regarding electronic data submittal. The Global ID Number is SL0601341185. Please submit a paper copy report for staff review and reference file number 07S0183 on all correspondence and reports.

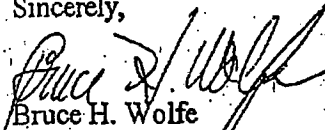
This Order requiring submittal of a report is made pursuant to Water Code Section 13267, which allows the Board to require technical or monitoring program reports from any person who has discharged, discharges, proposes to discharge, or is suspected of discharging waste that could affect water quality. The enclosure provides additional information about Section 13267 requirements. Any extension in the above deadline must be confirmed in writing by Board staff.

Walnut Creek Manor Requirement for Technical Report

6

If you have any questions, please contact Mary Rose Cassa of my staff at (510) 622-2447 [e-mail mcassa@waterboards.ca.gov].

Sincerely,


Bruce H. Wolfe
Executive Officer

Enclosure: California Water Code Section 13267 Fact Sheet



Linda S. Adams
Secretary for
Environmental
Protection

California Regional Water Quality Control Board

San Francisco Bay Region

1515 Clay Street, Suite 1400, Oakland, California 94612
(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>



Arnold Schwarzenegger
Governor

Fact Sheet – Requirements for Submitting Technical Reports Under Section 13267 of the California Water Code

What does it mean when the regional water board requires a technical report?
Section 13267¹ of the California Water Code provides that "...the regional board may require that any person who has discharged, discharges, or who is suspected of having discharged or discharging, or who proposes to discharge waste...that could affect the quality of waters...shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

This requirement for a technical report seems to mean that I am guilty of something, or at least responsible for cleaning something up. What if that is not so?
The requirement for a technical report is a tool the regional water board uses to investigate water quality issues or problems. The information provided can be used by the regional water board to clarify whether a given party has responsibility.

Are there limits to what the regional water board can ask for?
Yes. The information required must relate to an actual or suspected or proposed discharge of waste (including discharges of waste where the initial discharge occurred many years ago), and the burden of compliance must bear a reasonable relationship to the need for the report and the benefits obtained. The regional water board is required to explain the reasons for its request.

What if I can provide the information, but not by the date specified?

A time extension may be given for good cause. Your request should be promptly submitted in writing, giving reasons.

Are there penalties if I don't comply?

Depending on the situation, the regional water board can impose a fine of up to \$5,000 per day, and a court can impose fines of up to \$25,000 per day as well as criminal penalties. A person who submits false information or fails to comply with a requirement to submit a technical report may be found guilty of a misdemeanor. For some reports, submission of false information may be a felony.

Do I have to use a consultant or attorney to comply?

There is no legal requirement for this, but as a practical matter, in most cases the specialized nature of the information required makes use of a consultant and/or attorney advisable.

What if I disagree with the 13267 requirements and the regional water board staff will not change the requirement and/or date to comply?

You may ask that the regional water board reconsider the requirement, and/or submit a petition to the State Water Resources Control Board. See California Water Code sections 13320 and 13321 for details. A request for reconsideration to the regional water board does not affect the 30-day deadline within which to file a petition to the State Water Resources Control Board.

If I have more questions, whom do I ask?

Requirements for technical reports indicate the name, telephone number, and email address of the regional water board staff contact.

¹ All code sections referenced herein can be found by going to www.leginfo.ca.gov.

C

Kenneth R. Beard
P.O. Box 2695
Walnut Creek, CA 94595

April 14, 2006

California Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: RWQCB File No. 07S0183 (MRC)

To Whom It May Concern:

This letter is in response to your latest letter dated March 21, 2006, requesting a supplemental technical report on information for the property located at 3317 Vincent Road, Pleasant Hill, California (the "Property"). Specific to your requests, on behalf of the former officers of Etch-Tek, Inc. ("ETI"), I respond as follows:

- 1) The structure identified with red arrows in Section 2 of the Tri-S Report dated January 18, 2006 (the "Tri-S Report"), to the best recollection of the former officers of ETI, was a cover for the dumpsters. The tank on a trailer most likely belonged to ETI's landlord, Ed Beard. We recall that he purchased such empty water reserve tanks for his trout farm in Redding. We recall that Ed Beard eventually moved this type of tank to his commercial properties on Forni Drive in Concord, California. Apparently he never moved this tank to Redding.
- 2) We have no idea why Ed Beard (our landlord and our father) used ETI letterhead for the correspondence referenced in Section 3 of the Tri-S Report as he was not affiliated with ETI. However, we surmise that, as ETI's landlord but without an office of his own and working with the local municipalities for ETI's tenant improvements, he may have needed to borrow stationery to expedite the processing of such permits.
- 3) Regarding the facility layout by Ed Beard, we can only assume such layout had to do with some kind of permitting process for ETI's tenant improvements. The word solvent, as referenced on such layout, likely refers to either Isopropyl Alcohol or a terpene type cleaner, both of which were used by ETI. However, we do not recall that ETI ever used degreasing solvents containing PCE. In fact, we believe the Isopropyl Alcohol was the "flammable" product referenced in the Fire District records found in Section 3 of the Tri-S Report cited for improper storage.
- 4) The undersigned declares under penalty of perjury under the laws of the State of California that the foregoing, is true and correct to the best of my knowledge, as such knowledge was refreshed by discussions with other former officers of ETI.

The former officers of ETI have done our best to provide the information which the Board has requested in spite of having no records for ETI. The company policy, as the former officer of ETI remember it, was not to keep records longer than seven years. However, we are extremely concerned about the conjecture and statements being made about the operations, ETI and the use of the Property. The Tri-S Report is full of statements with no evidence to back them up.

More specifically, page 2 of the Tri-S Report references occupation of the Property by "Eteh-Tek Electronics, Inc." We assume Tri-S is referring to Etch-Tek Electronics Corporation ("ETEC") Please note that neither I, nor any of the other former officers of ETI, had any affiliation with ETEC, nor did such entity ever operate at the Vincent Road property. Statements on pages 2, 6, 14, 15, and 16 of the Tri-S Report also conclude that such entity (ETI or ETEC) has "a known history of PCE use" using the Board's Notice of Violation dated September 27, 2005, as the only evidence to substantiate this statement. Please provide a copy of this notice to my attention, as well as any evidence the Board may have, to substantiate this statement.

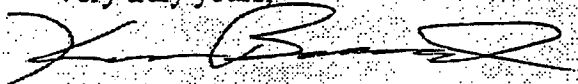
Moreover, the former officers of ETI are unaware of any waste treatment plant existing on the Property, nor are we aware of any underground pipe or pumping which may have existed or took place on the Property. Additionally, the aerial photographs of 1982, 1993 and 1998, relied on by Tri-S to evidence the physical alterations to the Property, were all taken after ETI vacated the Property.

Although we have a limited knowledge of hazardous substance migration, we note that Section 1 of the Tri-S Report shows an elevated level of PCE in the soil at the B7 location. Also, page 3 of the Tri-S Report states that "there is a tank and 'related' structure in the vicinity of such B7 location." While we have already explained the presence of the empty fish tank, we are still curious how close the location of the tank was to the B7 location and why Tri-S didn't test further in this area on the Walnut Creek Manor side.

Finally, our dim recollection from the late 1970s is that the carport area of Walnut Creek Manor also housed a maintenance building to support the residential facility. We are also curious how close the location of such maintenance building was to the B7 location, and again why Tri-S didn't test further in this area.

The former officers of ETI again assume this request is in connection with the Board's ongoing investigation of the Hookston Station Case # 7S0156, but nevertheless encourage the Board to share with such officers any information it has regarding the Property, so the former officers can aid the Board in ensuring it has all the information it needs. Additionally, please provide a copy of the Heilshorn Environmental Engineering date submission of December 16, 2005, as referenced in this Tri-S Report. If you would like to discuss any part of this response/technical report, please contact me at 925-788-4398.

Very truly yours,

A handwritten signature in black ink, appearing to read 'K. R. Beard', written over a horizontal line.

Kenneth R. Beard
Former officer of ETI

D

DOWNEY BRAND
ATTORNEYS LLP

555 Capitol Mall, 10th Floor
Sacramento, CA 95814

P: 916/444-1000
F: 916/444-2100
downeybrand.com

Katharine E. Wagner
kwagner@downeybrand.com

May 15, 2006

VIA FACSIMILE AND ELECTRONIC MAIL

Bruce H. Wolfe, Executive Officer
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Mayhew Center LLC Request for Completion of Site Investigation and Site History at Walnut Creek Manor; Walnut Creek Manor Responses to ERM Workplan Dated April 19, 2006 for Passive Soil Vapor Survey at Vincent Street Properties, and (RWQCB File No. 07S0156)
Client-Matter No. 37396.00000

Dear Mr. Wolfe:

Mayhew Center LLC (Mayhew Center) has received ERM's April 19, 2006 Workplan for Passive Soil Gas Survey and the Regional Board's April 25, 2006 approval of the workplan. We also received two responses to that plan submitted by representatives of Walnut Creek Manor (WCM) – specifically, a letter of May 5, 2006 from Brian Kelly, counsel to WCM, and a comment letter dated May 5, 2006 from Tri-S Environmental (the consultants retained as of January 2006 by WCM). WCM states strong objections to ERM's proposed work. In the process, WCM also includes many self-serving statements and misrepresentations concerning the site investigation at WCM and regarding Mayhew Center, and voices criticisms of Regional Board procedure. Finally, despite information indicating that further work is clearly justified at WCM, as well as the Regional Board's statements that deeper borings and groundwater investigation will be required at WCM, WCM indicates it believes no other work is or should be required on its property.

ERM's Workplan for Soil Vapor Survey

Mayhew Center has been prepared to cooperate in the work proposed by ERM, as Mr. Dunivan informed ERM before hearing of WCM's refusal to do so. Mayhew Center was also prepared to assist in obtaining concurrence from John Hook, who owns the land under the northern Mayhew Center building. While it was not clear that all the sampling locations proposed on Mayhew Center were justified or needed, and neither the workplan nor the approval explained the rationale for the details of the study or how the results would be interpreted, Mayhew Center wishes to cooperate in any useful efforts to identify the source or sources of PCE in the area.

EXHIBIT A

For the sake of clarity, while it may be stating the obvious, we note that the purpose of ERM's proposed work can only be addressed with coordinated work on all the various properties described in the workplan. In particular, work must be done at WCM in order to make the work at Mayhew Center, and likely other adjacent areas, useful. Therefore, the work proposed to occur at Mayhew Center should go forward only after access to WCM is resolved.

Request that the Regional Board Require WCM to Complete its Site Investigation and Site History Critical to Identification of the Source or Sources of PCE Affecting Mayhew Center

As we have noted in our prior letters to you dated April 10 and April 14, 2006, Mayhew Center asks that the Regional Board complete a logical course of action to identify the source of PCE affecting Mayhew Center and WCM. This requires completion of work on WCM, the upgradient property with actual structures and activities (rather than fictionally described) in the areas where PCE has been. We are extremely concerned that the Regional Board has avoided review and interpretation of the data and site history information already in the agency's hands. By doing so, and issuing no deliberative comments on information and information gaps, the agency gives the impression it plans simply to use the resulting chaos to issue an unwarranted cleanup and abatement order to all identified as "upgradient sources" or "upgradient parties," without technical or regulatory justification.

Mayhew Center formally requests by this letter that the Regional Board issue a Water Code 13267 order to WCM for further site history and to complete necessary site investigation at the WCM property. Consistent with prior directives and undertakings by the Regional Board, the site investigation should include deeper soil borings and groundwater investigation of the storage and maintenance areas near the boundary with Mayhew Center, and should include investigation in the area of WCM's underground tank revealed in December 2005, after the previous investigations. Site history should be supplemented based on interviews with personnel with relevant historical experience at the site, and should cover the full range of activities at the site which could have used PCE, such as for maintenance and cleaning activities.

Requiring the completion of deeper borings and groundwater work near the border with Mayhew Center is consistent with previous calls for such work in:

- (1) WCM's consultant's own May 20, 2005 report of the initial soil and groundwater work performed at WCM, which even contained a map of recommended further deep boring locations;¹
- (2) ERM's July 25, 2005 comments on that report;
- (3) the Regional Board's July 29, 2005 request for further investigation;²

¹ The May 2005 Report by Heilshorn Environmental Engineering (HE2) submitted by WCM recommended further investigation be performed to establish if a source of PCE exists on WCM property in the area of Boring B7, and suggested three additional soil borings in the area just west of Boring B7 in the storage sheds on WCM's property. The report recommended that the borings be drilled to 28 to 30 feet, with soil sampled at 5 foot intervals, and groundwater analyzed from each boring.

² The Regional Board's July 2005 Investigation Request indicated that PCE had been found in soil and groundwater during WCM's April 2005 work, noting that boring B-7 was located three feet east of the fence line and storage

(4) the Regional Board's October 19, 2005 conditional approval of WCM's September 2005 workplan for shallow soil work;³

(5) ERM's October 31, 2005 comments on WCM's shallow soil workplan;

(6) Mayhew Center's October 27, 2005 letters requesting delay and expansion of WCM's shallow soil work; and

(7) your letter of November 14, 2005 to Mayhew Center's counsel, Mike Bonnifield (copied to WCM's counsel and consultants).⁴

All of these documents noted that WCM should be required to perform deep soil borings and groundwater investigation in areas near the boundary with Mayhew Center, particularly if PCE was found in the shallow soil by WCM's shallow soil investigation in November 2005 (which it was). Subsequently, Mayhew Center's consultant found and submitted on December 1, 2005 uncontroverted evidence of an underground tank removal and oily wastes handled at WCM, not previously disclosed in site histories submitted by WCM, as discussed further below.

sheds, and had 6600 ug/l PCE in soil at a depth of 15 feet below ground, and 1200 ug/l PCE in groundwater 28 feet below ground. The Regional Board further noted that area groundwater generally flows northeasterly from WCM toward Vincent Road. The July 2005 Investigation Request stated that the April 2005 work had not investigated soil and groundwater beneath the storage sheds located at WCM's property at the property line with Mayhew Center, and requested WCM to submit a workplan for additional soil and groundwater investigation to determine the source and extent of the PCE detected in the April 2005 investigation.

³ In the October 19, 2005 letter, the Regional Board indicated that depending on the results of the investigation, Board staff may find it necessary to require additional groundwater sampling from locations close to the property line, and between existing boring locations (previously made to groundwater on WCM's property) labeled borings B-3 and B-5. The letter offered to review groundwater sampling plan right away if WCM wished to do the full investigation to groundwater at the same time as the shallow soil sampling.

⁴ In the November 14, 2005 letter, you declined to delay WCM's work, as that was not a normal step when an initial stage is proposed, and assured Mayhew Center that the work would be completed in two phases. Specifically, the November 14, 2005 letter described the Regional Board's plan to have investigation being performed at WCM extend to deeper soil and groundwater, if contamination was found in the shallow soil investigation, as follows:

"We indicated to WCM that a trench would be an effective way to investigate the soil in question, and also suggested that borings could also be used to sample the soil with a tight spacing (three to four feet north and south from the "reference point"), at a depth of six inches and then every foot in depth for the first five to six feet. If contamination were observed, then WCM would have to sample deeper soils and groundwater. We would allow a "two-step" approach because WCM believed deeper sampling (e.g., to 28 feet) would require a drilling rig with a height that would require dismantling the roof of the storage area, and WCM was opposed to dismantling the roof. (Since that time, Board staff has provided WCM with information about low-clearance drill rigs.)" (Emphasis supplied.)

WCM's consultants performed limited shallow soil work in November 2005, and reported on their shallow soil work in a report by HE2 dated December 16, 2005. (The report did not address the underground tank issues, as the tank had not been known during the previous work.)

Examination of the December 16, 2005 report shows the following, even to the lay reader:

PCE contamination was found well into the WCM property, appearing to continue deeper than the six foot borings to which work was limited. Contamination was substantial in borings B-17, B-18, and B-19, which were a substantial distance from the "hot spot" alleged by WCM, and two of which were 13 feet from the fence line. Yet the Regional Board has not requested that WCM continue with deeper borings and groundwater as planned under the Regional Board letters of October 19, 2005 and November 14, 2005.

Review of the various maps in the December 16 and May 20, 2005 HE2 reports show that no reliable map of the boring locations has been provided. A reliable map should be required, along with text indicating the process used to locate the borings in the survey and measurement process used to create the map. If the locations are not 100% certain, that uncertainty should be disclosed. Importantly, the borings furthest away from the alleged "hot spot" and boring B-7 on Mayhew Center cannot be reliably determined from the reports submitted by WCM. Professional survey work by Cunha was done in November only after many of the April 2005 borings (B-1 through B-11) had been paved over, and without consulting Mayhew Center on the location of B-7 in dirt within a planter area.

The Cunha surveyor maps included have such a small scale (one inch equals 40 feet) that it is impossible to use to review the distances between the borings at the boundary of the properties, and the maps do not label all relevant site buildings and storage areas. The only HE2 figure with a scale large enough to see the borings in relation to each other, Figure 4 does not say it was surveyed, and comparison of the figure to the report text and the workplan suggests that the borings furthest from B-7 have been shown closer to B-7 than is likely to be the case. The report does not describe any process of measurements of the final boring locations used to create the map.

PID readings taken by Regional Board staff (why the work was by Regional Board staff rather than WCM is unexplained) did not extend to the southernmost points furthest from the alleged "hot spot" asserted by WCM. However, PID readings were high in borings far from the alleged "hot spot." Inside WCM's storage shed, high PID readings (up to 12,700 ppb-v) were recorded - and the readings increased by depth, with the maximum occurring at 6 feet below ground surface, the deepest level sampled.

On the apparent theory that the best defense is a good offense, WCM subsequently submitted reports by Mr. Odencrantz of Tri-S Environmental making wild accusations concerning fictional structures in Mayhew Center's parking lot and PCE use at Mayhew Center. The reports contain figures omitting to plot the borings further from the fence line, e.g. borings B-18 and B-19. Unsupported and erroneous allegations are made that substantial areas of Mayhew Center's parking lot drain to WCM property. Photo captions make much of the seepage of small amounts of water at the base of the retaining wall constructed long ago when WCM excavated and graded its property to create a lower grade up to the fence line. The

wall is next to the small unpaved border of Mayhew Center which obviously receives rainfall. Photos do not show the areas of activity at WCM.

Contrary to WCM's assertions, the "clean" groundwater samples taken on WCM do not prove WCM is not a source, as they were not taken in WCM's key potential source areas. The height of irony is that what WCM refers to as contamination found in groundwater at Mayhew Center, was found in a boring, obviously located in WCM's original April 2005 investigation in area designed to test whether any contamination might be migrating from WCM's "storage areas." (No thought or mention existed at that time of the fictional wastewater plant in Mayhew Center's parking lot.) In fact, Regional Board staff urged Mayhew Center to cooperate in allowing access for the purpose of detecting migration from WCM. Groundwater work WCM omitted the area on WCM's side at that potential source. WCM simply chose to sample groundwater in the area on the Mayhew Center side of the boundary down gradient of WCM. The May 2005 report of the investigation concluded that further deep boring and groundwater sampling work at WCM was needed to determine whether a potential source existed at WCM's "storage areas," yet such work has never been done.

The area of WCM's underground storage tank should be investigated. As noted above, Mayhew Center's consultant found and submitted on December 1, 2005 uncontroverted evidence of an underground tank removal and oily wastes handled at WCM, not previously disclosed in site histories submitted by WCM. ERM's quarterly monitoring for the Hookston Station project detected evidence of petroleum hydrocarbons and freon in groundwater down gradient of the tank. The tank appears to be upgradient of Borings B-4 and B-6 which show PCE. No investigation has been ordered by the Regional Board of the underground tank area; ERM's soil gas survey proposes just shallow vapor sampling in the area.

The minimal information on the underground tank provided to date does not remove any concerns whether the tank, which sat in an abandoned state for some 14 years, received waste materials that could have included waste oil and solvent with PCE from maintenance activities. The application for tank removal permit listed tank contents as "unknown." WCM's submissions indicate that the contents were manifested as water and used oil non-RCRA hazardous waste. However, solvents and metals were not sampled for upon tank removal, and only very limited petroleum soil sampling was performed.

Only a brief statement concerning the underground tank was submitted in response to a Regional Board request to update WCM's site history, on January 20, 2006. The statement did not indicate that information had been sought from any WCM employees knowledgeable about the maintenance or use of the tank before its removal in 1998, except to note the original purpose of the tank was to store diesel fuel.

The Inadequacy of Site Histories Submitted by Walnut Creek Manor

The Regional Board has failed to pursue a complete site history from WCM concerning activities at this huge apartment campus since the 1960s and conditions and activities in the active areas at the border with Mayhew Center. Given the substantial amount of PCE used in consumer and commercial maintenance products over the decades, we would expect details of activities at WCM to be pursued in more detail. In addition to late and limited information submitted on the underground tank at the site, only incomplete site histories have been submitted by WCM to date. Yet both Regional Board staff and WCM seem to

resist further information requirements on the basis that this is just a residence for elderly individuals, ignoring the large campus and its maintenance history and requirements.

The site histories submitted do not describe WCM's maintenance, maintenance vehicle (e.g. golf carts, bicycles) and appliance repair and other support activities performed at this large campus, or whether hazardous materials were used, stored or handled in the areas used actively by WCM right at the boundary with Mayhew Center. Notably, WCM's submissions to date have not been based on information from any WCM representative with personal experience at WCM preceding the mid-1980s or, most importantly, maintenance activities before the mid-1990s. Even if dry cleaning had occurred there in the past, the responding persons might well not know of it.

While the facility is consistently referred to as "senior housing" (as if knitting and cribbage were the only activities at the site) the absence of information on WCM starkly contrasts to the dogged pursuit by the Regional Board of explanations for every vague insinuation raised by WCM about Mayhew Center history. Despite the burden of responding to each of these allegations, Mayhew Center and Etch-tck's submissions have fully countered the allegations repeated in WCM's current submissions. In contrast, the maintenance and storage activities over decades at WCM, as well as the abandoned underground tank contents, have gone largely undocumented.

The Status of Any Regional Board Requirements of Mayhew Center LLC

Surprisingly, the Regional Board has not responded to the need to complete the investigations at WCM, nor has the Regional Board noted the serious problems with WCM's submissions or noted the lack of accurate maps and figures. How the Regional Board even thought work could be done at Mayhew Center with this upgradient work in such a disarray is perplexing.

Mayhew Center was assured in a letter from the Regional Board dated February 11, 2005, and on several subsequent occasions, that no further work would be required at Mayhew Center until work at WCM, an upgradient property, was complete.⁵ Mayhew Center is not only concerned with the confusion inherent in the Regional Board's conflicting directives, but is concerned that a source of PCE affecting Mayhew Center property cannot be determined without completion of the work at WCM's facility.

The March 6, 2006 letter to Mayhew Center responding to Mayhew Center's proposed voluntary soil investigation workplan simply illustrates the box Mayhew Center has been painted into. The letter's assertions clearly signal that the work being asked of Mayhew Center is not expected to identify the actual source of the PCE. The Regional Board does not explain how deep borings and groundwater investigation on Mayhew Center's property can (or why it should be required to) confirm any sources on the WCM property, so either the Regional Board has silently concluded there is a source at Mayhew Center, or it is pursuing information which will create unsymmetrical information that will bias a determination of a source.

⁵Note also your letter of January 6, 2006 to Mayhew Center's counsel Michael Bonnifield did not conclude that further submissions would be required, noting that submission cited in the September 27, 2005 Notice of Violation was still under review, and that review may conclude that compliance has been achieved.

The two May 5, 2006 submissions by WCM repeat unsupported statements and speculation submitted in the past by WCM, as if repeating them will make them true. These statements center around allegations concerning Etch-tek, a former tenant at the site before Mayhew Center's ownership. In fact, Mayhew Center LLC and officers of Etch-tek have both responded in detail with site history, under penalty of perjury, and have repudiated the allegations regarding past PCE use at Mayhew Center. It is extremely disturbing that the Regional Board has condoned the weaving of fictional stories about a wastewater treatment plant being located in the Mayhew Center parking lot, at an area which just happens to be behind WCM's active storage and maintenance areas (though nowhere near any sewer or water line). These stories were based on laughable interpretations of fuzzy spots on old aerial photos, which apparently referred to a fish tank on a trailer (that was used in a commercial trout farm), as one can see from aerials interestingly available but not included in the reports. The reports bolster the appearance of credibility by throwing around terms relating to wastewater treatment within the operation (simple pH neutralization), flammable materials (somehow missing the fact that PCE is not flammable), and mention of "solvent," which has been explained to be isopropyl alcohol.

Although all of these references have been completely explained away, and these references never did indicate the use or discharge of VOCs or PCE, the Regional Board has followed up on each as if they were credible, and has never commented to inform the parties or public of any actual determinations.⁶ We cannot emphasize enough the damage this does to our client and has made communication in the matter appear futile.

As pointed out in our April 10 letter, the Regional Board itself inappropriately and entirely without support used the phrase "*Etch-tek, a known user of PCE*" in a Notice of Violation dated September 27, 2005. This outdated document does not excuse WCM's representatives citing this phrase again in their May 5, 2006 submittals, as if it proves a fact, despite contrary evidence submitted both before and since that time. However, it obviously continues to damage our client. We request that the Regional Board remove this aggravating misstatement from the record and that Regional Board staff confirm once again that the Regional Board does not have evidence that Etch-tek used PCE at Mayhew Center.⁷

⁶ We draw your attention in particular to the site history submission dated April 14, 2006 submitted by Ken Beard, a key former manager and officer of Etch-tek, who has now responded to every detail of the questions and fictional accounts raised by WCM representatives based on small white or dark spots on blurry aerial photographs and insignificant notations on plot plans. A copy of that response is attached for ease of reference. We do not know why this document was not posted to Geotracker earlier. However, in response to our inquiry, yesterday Ms. Cassa confirmed to us that it has been.

⁷ While the Regional Board has refused to remove the September 2005 Notice of Violation from Geotracker noting that it has no independent legal effect, it has publicly reversed its statement regarding Etch-tek. In your November 14, 2005 letter to Mayhew Center's counsel, Mike Bonnifield (copied to WCM's counsel and consultants), you indicated that Regional Board staff has not yet reached any opinion as to Etch-Tek's possible involvement as a discharger. The letter explained the Regional Board's interest in Etch-tek resulted purely from the fact that electronics manufacturers are prioritized as standard procedure to be potential sources for VOC releases, because PCE is a common industrial solvent. This "standard procedure" is not a judgment that Etch-tek used PCE at the facility, and all information submitted regarding the site, under penalty of perjury, has negated any such initial screening step by the Regional Board.

Bruce H. Wolfe, Executive Officer
California Regional Water Quality Control Board
May 15, 2006
Page 8

We look forward to the Regional Board's more focused and technically thorough review of the data and correspondence in its files, and Regional Board's written confirmation that Mayhew Center is currently under no outstanding requirement to perform further work. We await your response to our request to meet with you to discuss details of the matter, and have asked you to personally investigate the matters here due to the many letters sent out under your signature and without appropriate regulatory process.

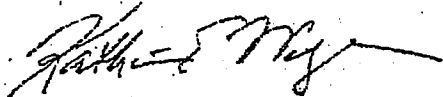
Relationship of Walnut Creek Manor and Mayhew Center Findings to Hookston Station

Finally, we note that these comments and our request that the Regional Board require additional site history and investigation work at WCM, in no way indicate that Mayhew Center believes a connection has been shown between these Vincent Road properties and contamination at, near or down gradient of Hookston Station. It does appear that the Regional Board may have been inclined to accept incomplete information before allowing focus to shift from the Hookston Station area to properties including both Mayhew Center and WCM. We ask that the Regional Board make a thorough technical review of available technical data to assure itself, our client and the public that the existence or significance of "upgradient source areas" is being appropriately discussed in the Hookston Station project documents.

We continue our appeal to you to personally investigate the manner in which this process has unfolded, and the manner in which Mayhew Center has been treated, and to meet with Mayhew Center to ensure that you understand the history in this matter, and to confirm in writing that no investigation or report requirement is pending with respect to Mayhew Center at this time.

We look forward to hearing from you regarding this matter, including the request that WCM be required to complete its site investigation and site history, and the request that you investigate and meet with us to discuss the manner in which Mayhew Center has been treated. Meanwhile, and without deferring our requests, if the coordinated ERM soil vapor workplan will be implemented on all the proposed properties, Mayhew Center is ready to cooperate in facilitating ERM's proposed activities. Thank you.

Very truly yours,



Katharine E. Wagner

777330.1

Enclosures

cc: Dean Dunivan (w/encls.), via electronic mail
Michael Bonnifield, Esq. (w/encls.), via electronic mail
Craig Andersen, Esq. (w/encls.), via electronic mail
Gary Grimm, Esq. (w/encls.), via electronic mail